

(24,667)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 430.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN
ERROR,

vs.

CAPITAL TRUST COMPANY, AS ADMINISTRATOR OF THE
ESTATE OF WILLIAM M. WARD, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

PITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased, Plaintiff,

VS.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Summons and Complaint.

The plaintiff for its complaint herein states and alleges:

I.

That the defendant is a railroad corporation organized under the laws of the State of Minnesota; that during all the times herein mentioned it owned, maintained and operated an interstate line of railroad extending into and through the State of Minnesota and other states, and into and through the City of Minneapolis, and in Minneapolis owned, maintained and operated, in connection with its interstate line of railroad, several large yards, and particularly one yard at or near 25th Avenue Southeast, in said City of Minneapolis, and over said line used and owned and maintained and operated the usual locomotive engines, freight cars and other railroad equipments; that the train and cars upon which the deceased was working at the time of said accident and his death were being used by the defendant in interstate commerce and that the deceased was injured and killed while engaged in such work.

II.

That on the 13th day of December, 1912, the deceased was in the employ of the defendant for hire as a switchman, engaged in the performance of his duties in and about the defendant's yard, and particularly said yard at and near 25th Avenue Southeast, Minneapolis; that on said day, and at about the hour of half past ten o'clock in the forenoon, the defendant was running and operating a freight train, consisting of a locomotive engine and about fifteen cars, along and over one of its said tracks near 25th Avenue Southeast, which said train was being moved in the backward motion, the engine pushing the cars, and that the work being done at the time was what is commonly known as switching, and that the particular purpose of the movement of the train was to cause certain cars at the rear of said train to be uncoupled while the train was in motion and switched in the manner commonly known as "kicking" said cars; that an employe of the defendant, known as the foreman, was in immediate charge and control of said

operation; that the deceased was one of the switching crew working upon said train; that while said train was thus moving backward, and in the due and proper performance of his duties, the deceased was upon top of said train; that while said train was thus backing, and pursuant to orders given to said deceased, he was walking towards the rear of said train and on top of the cars, for the purpose of going to the cars that were to be cut off and kicked and of riding the same in; that the defendant, through its foreman, at said time and place directed the deceased so to do; that the defendant, through its foreman, uncoupled said cars for the purpose above stated; that then and there a stop signal was given to stop said train; that said uncoupling was made and said stop signal given before the deceased had had time or opportunity to reach the cars that were being uncoupled and while the deceased was upon top of the car next to the one that was to be uncoupled and while he was in the act of hurrying to the end of said car for the purpose of stepping over upon the cars that were to be uncoupled; that, as said train stopped in response to said stop signal, the deceased was thrown from the top of said car and underneath the wheels thereof and that he was then and there so crushed and mangled that he shortly thereafter died, living about fifteen minutes; that the defendant and its servants and agents in charge of the giving of said signals and uncoupling of said car did then and there carelessly, negligently and wrongfully uncouple said car and stop said train

4 before giving the deceased time or opportunity to reach the place or car where he was ordered to go, and carelessly, negligently and wrongfully stopped said train and uncoupled said car and caused the same to separate while the deceased was proceeding towards the end of the car upon which he was riding when the stop was made and while he was in a dangerous position and likely to be thrown from the end of said car, and carelessly, negligently and wrongfully failed to warn or notify the deceased of the intention of uncoupling at said time and place and of stopping said train, and carelessly, negligently and wrongfully failed to exercise due care for the protection of said deceased, and that such careless, negligent and wrongful acts and omissions contributed to said accident and the death of said deceased; that at said time the defendant and its servants and agents in charge and control of the movements of said engine and train were carelessly and negligently running the same in the backward motion at a high, excessive, unusual and improper speed, to-wit, from fifteen to twenty miles per hour, that at said time and place said defendant, and its said servants and agents carelessly, negligently and wrongfully caused said train to stop with great, unusual and unnecessary force and violence, and carelessly, negligently and wrongfully jerked and threw the deceased under said train and that such careless, negligent and wrongful acts and omissions on the part of the defendant and its said servants and agents contributed to said accident and the death of said deceased.

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III.

The plaintiff further states and alleges that said deceased died testate; that he was unmarried; that he was of the age of twenty-seven years; that he was a strong and able bodied man and an experienced switchman; that in his work as switchman in said yard and at all times he was engaged in working about and upon trains, engines and cars that were used in connection with and as a part of the work of moving and handling interstate commerce merchandise; that he was earning in his work wages averaging from \$80 to \$100 per month; that he left surviving him as his sole heirs and beneficiaries, his father, Orren M. Ward, aged fifty years, and his mother, Treessa Ward, aged about forty-five years; that his said parents were dependent upon such deceased to a considerable extent for support and maintenance; that out of his wages, he contributed to said parents from \$150 to \$200 a year; that said deceased lived, as above stated, some little time after said accident and that during his life time he had a cause of action against the defendant and that under and pursuant to the provisions of the Federal statutes thereunto made and provided, said cause or right of action survived to this plaintiff for the benefit of said parents; that the expectancy of life of said deceased was about thirty-seven years; that had said deceased not been injured and killed he would have lived and would have been capable of earning, during the rest of his life, an aggregate sum of at least thirty-five thousand dollars; that this action is brought under and pursuant to the terms of said Employer's Liability Act as amended.

IV.

The plaintiff further states and alleges that it has been duly and lawfully appointed administrator of the estate of said deceased and by the Probate Court of Hennepin County, Minnesota, and is fully qualified and is authorized to bring this action.

V.

The plaintiff further states and alleges that for the reasons aforesaid it has been damaged by the defendant in the sum of thirty-five thousand dollars.

Wherefore, plaintiff demands judgment against the defendant for the sum of thirty-five thousand dollars, and for its costs and disbursements herein.

SAMUEL A. ANDERSON,
*Attorney for Plaintiff, 604 New York
Life Bldg., St. Paul, Minnesota.*

7 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

CAPITAL TRUST COMPANY, as Administrator of the Estate of of
William M. Ward, Deceased, Plaintiff,

VS.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Answer.

Defendant answering the complaint herein:

1. Admits the allegations of paragraph 1 of the complaint.
2. Admits that Wm. M. Ward was, on the 13th day of December, 1912, in the employ of the defendant as a switchman, engaged in the performance of his duties in and about defendant's yards in Minneapolis.
3. Admits that on said day the said Wm. M. Ward fell from a moving freight car, and was run over thereby and killed.
4. Denies that said accident was caused by negligent act or omission of defendant, its agents or employees, other than said deceased, himself, who was then and there guilty of carelessness and negligence, which directly contributed to and caused his death, as aforesaid.
5. Alleges that said deceased, with full knowledge of all the risks, hazards and dangers of the employment in which he was then engaged, fully assumed the same, and particularly assumed the risk and danger from falling from said moving car, as aforesaid.
6. Has no knowledge or information sufficient to form a belief as to whether said deceased was unmarried, or as to what heirs or statutory beneficiaries he left him surviving, or as to whether his father or mother were in any wise dependent upon him for support or maintenance, or as to whether he ever contributed any portion of his wages to their support or maintenance, defendant leaves plaintiff to make such proof thereof as it may be advised.
7. Admits that plaintiff is the duly appointed and qualified administrator of the estate of said deceased.
8. Except as hereinbefore admitted, defendant denies each and every allegation of said complaint.

Wherefore, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs and disbursements herein.

M. L. COUNTRYMAN,
Attorney for Defendant.

203 Great Northern Building, St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Reply.

The plaintiff for its reply to the answer of the defendant in the above entitled action, denies each and every allegation in said answer contained, save and except such parts or portions as constitute admissions of allegations contained in the complaint.

SAMUEL A. ANDERSON,
Attorney for Plaintiff.

604 New York Life Building, St. Paul, Minnesota.

9 District Court, Second Judicial District.

STATE OF MINNESOTA,
County of Ramsey:

CAPITAL TRUST COMPANY, as Administer of the Estate of William
M. Ward, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

This cause came on for trial before Hon. Olin B. Lewis, J., with a jury, on the afternoon of Tuesday, January 13, 1914, S. A. Anderson appearing on behalf of plaintiff, and M. L. Countryman and A. L. Janes on behalf of defendant.

Jury called and sworn and case opened by Mr. Anderson.

Court adjourned until Wednesday morning at 10 o'clock a. m.

FRANK HOLDEN, sworn on behalf of plaintiff, testified:

By Mr. Anderson:

Q. I think you live in Minneapolis?

A. Yes, sir.

Q. And are now in the employ of the Milwaukee Company, as I remember it?

A. Yes, sir.

Q. Were you in the employ of the defendant, Great Northern Railway Company, at the Hamline yards at the time of Ward's death?

A. Yes, sir.

Q. And a member of the same crew, I think?

A. Yes, sir.

Q. Engaged in switching operations at the time this accident occurred?

A. Yes, sir.

Q. I think that is conceded. How many men were there in the crew at this time?

A. There were three helpers, two switch-tenders, a foreman and a pin-puller.

10 Q. That is seven besides the engine crew. Who was the foreman?

A. Rogers.

Q. And Mr. Ward was one of the crew?

A. One of the helpers.

Q. And what part of the crew did he belong to? What do you designate him as?

A. He was a helper, riding cars.

Q. Do you call them field men?

A. Field men, yes.

Q. How many were there of the field men?

A. Three.

Q. What were you?

A. Field man.

Q. Was the train upon one track as distinguished from over a switch or two tracks when the accident occurred?

A. They were backing down on the lead, coming down the lead.

Q. Then the train was on the lead when this accident occurred?

A. No, it was over a switch, backing just——

Q. Anyway you were backing down on the lead?

A. Yes, sir.

Q. What kind of a switching operation was being made and was made in connection with this movement of the train?

A. Well, there was a kick sign.

Q. How many cars were in the train?

A. Fourteen or fifteen.

Q. In what direction did that track run by the compass—east, west, north or south, or how?

A. I don't know just the directions in there.

11 Q. You can't tell the direction now?

A. No, but there was a straight track; that is all I know.

Q. The lead was a straight track, did you say?

A. Yes.

Q. At any rate, let's get at it so as not to confuse ourselves. Was the engine backing or was it headed against the cars?

A. It was backing.

Q. Where were you as the train came back?

A. I was behind Rogers.

Q. Well, I know, but I mean generally.

A. On the ground.

Q. Now, the engineer would be on the righthand side of the engine looking towards the head of the engine?

A. Yes, sir.

Q. Now, which side were you and Rogers on—the engineer's side?

A. Yes, sir.

Q. Now, the yard tracks connect with the lead-track by switches, certain ones?

A. Yes, sir.

Q. And then they run off either to the right or left of this lead track. Which side did the tracks run off to—on the side you were on or on the opposite side?

A. On the opposite side.

Q. And was there any switch lined up as this train came back so as to open up one of these sidetracks off the lead?

A. Well, you see they are all lined up, and the switch-tender was to throw the switches.

12 Q. They are already lined up for the main line?

A. Yes, sir.

Q. Well, was there one lined up to receive one or more of these cars on this movement?

A. Well, unless the switch-tender was away back there—the car went back and went down through another switch; the switch-tender merely had to throw that switch. I never noticed the switch.

Q. Afterwards you rode the car in, that is what I mean.

A. Yes.

Q. Did it pass in ultimately on some sidetrack?

A. Yes.

Q. Now, how far away from the train as it came back along the lead, or rather, how far away from the lead-track to one side was Mr. Rogers as this train backed up?

A. Where do you mean—where Rogers was standing, how close to the train?

Q. Yes, how close to the train as it would pass by him?

A. Well, he was standing about ten or fifteen feet.

Q. And how far away were you?

A. Well, I was about the same distance.

Q. And who else was there with you?

A. Well, there was the pin-puller.

Q. What is his name?

A. Duffy, I think.

Q. Do you know where Mr. Ward was as the train came back?

A. He was on the second or third car.

13 Q. Second or third car from which end—so as to have the record?

A. The rear end.

Q. And do those cars have running-boards along the centers at the tops?

A. Yes.

Q. Where was he with reference to the running board?

A. He was standing in about the middle of the car on the running-board.

Q. Which way was Rogers facing as this—

The Court: Is this Mr. Ward or Rogers?

Mr. Anderson: Mr. Ward. Mr. Rogers was on the ground, he states, ten or fifteen feet away from the track.

Q. Which way was Rogers facing as the train came back?

A. Facing the engineer.

Q. And you have already said that the track was straight. Did you notice in what direction Mr. Ward was facing as the car he was on came back towards you gentlemen?

A. He was facing toward us.

The Court: Toward the engineer?

Witness: No, the rear.

Q. Well, with reference to Mr. Rogers and you.

A. Facing us.

Q. Who, if anyone, had the switching list?

A. Rogers.

Q. And by "switching list" I suppose that is the list that indicates what is to be done with the cars?

A. Yes, sir.

14 Q. And who, if any one of the crew, had charge of the giving of signals?

A. Rogers had, the foreman.

Q. State whether or not any sign or signals were given by the foreman Mr. Rogers to the engineer or to anyone as this train came back to where you gentlemen were standing.

A. Yes, sir.

Q. As nearly as you can tell us, indicating with reference to point on the lead-track opposite Rogers, how far away was the rear car when Rogers gave the first signal as that train backed up?

Mr. Janes: Just a moment; the witness hasn't testified to but one signal being given.

Q. Well, any signal. How many signals did Rogers give in connection with the backing up of this train up to the time that you stopped looking at him?

A. Two signals.

Q. What were they? As long as we are on that, how do you designate them by name?

A. Well, the cut-off, one car, and the stop signal.

Q. Now, where was the first or rear car when he gave the one-car or cut-off signal?

A. About two cars from me, back of me.

Q. About two cars up towards the end?

A. Yes.

Q. At that time, as nearly as you can tell us, from your observation, how fast was that train backing?

A. About 12 or 15 miles an hour.

Q. When did you first learn or know how many cars were to be cut off and kicked?

15 A. After Rogers give the car signal, cut-off signal.

Q. What was the source or means by which you field men, in the operation there, got the information, when you were making

kicking switch, as to the number of cars to be cut off? How did you get the information generally there as the work was carried on?

Objected to as too general.

The Court: I suppose the signal for that particular movement can be described.

Q. How did you as a field man and you field men in the crew find out how many cars were to be cut off in any switching movement there as the work was customarily carried on?

A. From the sign of the foreman.

Q. Now, if there was one car to be cut off and kicked, what was the signal?

A. (Witness motions).

Q. It would be the striking together of the hands once?

A. Yes; and the cut of (indicating).

Q. And the shooting up in the air of one hand. What would be the sign when you would cut off two cars?

A. Well (indicating).

Q. The number of cars would be indicated by the motion, the number of times you would strike the hands together?

A. Yes; that is, up till three.

Q. Up to three. Well, I am not interested above that. And as I understand, you said Rogers gave the one-car signal?

A. Yes.

Q. Was the switching movement being made at the time of the kicking movement?

A. Yes, sir.

Q. What is a kicking switch movement?

A. A shaking of your hand in the air.

Q. That is what is called the kick signal?

A. Yes.

Q. When you want to kick a car, you give a motion like that. And you have heretofore said that the foreman gave two signals, one a car signal and the other the stop signal. Did anyone give, prior to that, any kick signal?

A. No, sir.

Q. But the question I asked was as to what is a kicking switch movement. Just give us what is done and how it is done. Of course we all know probably but we want it on the record.

A. A backing-up kick, ain't it?

Q. Well, go on and tell what is done. You are backing up, you did you give the kick signal and then you give the car signal; what the next signal given?

A. Well, then it is the stop signal.

Q. And what is done with reference to the car or cars that are to be switched? Are they uncoupled?

A. Yes, sir, they are uncoupled.

Q. Then a kicking movement, as they call it, is where you move your train back and at the proper time uncouple by pulling the pin and stopping the train and letting that car go on with its own momentum; that is right, is it?

17 A. Yes.

Q. And the shoving movement is where you have the whole train backed with the speed of the engine?

A. Yes.

Q. How far back was it from the place where this car signal and stop signal were given to the point where the car that was cut off finally stopped?

A. Well, about three cars from where the cars separated.

Q. Yes, I guess you misunderstand. You are now speaking of where the engine stopped.

A. From where he give the one-car signal?

Q. Yes, but I mean where did the car that was cut off and went back—

A. Oh, went down.

Q. How far did it run before it stopped?

A. About fifteen or twenty, I guess.

Q. You railroad men use a car as the unit of measurement. How long is a car as you speak of it in measuring?

A. Well, about 36 to 40 feet.

Q. I think you have already said that it was running 12 or 15 miles an hour?

A. Yes.

Q. Who rode the car down that was cut off?

A. I did.

Q. Do you know yourself how far it was intended to have the car go on this kicking movement?

A. No, sir, not until I rode her in.

Q. Well, what stopped the car?

A. When it went against the other ones.

18 Q. With what force did it go down and strike the other cars?

A. It went down there at the same gait as when it was cut off.

Q. Did you use the hand-brake?

A. The hand-brake, I couldn't hold it.

Q. Was there something wrong with the hand-brake?

A. I don't know; the brakes didn't hold in it.

Q. What have you to say with reference to the speed of the train at this time as to whether it was the usual and customary speed to move a train back in making that kind of a switching movement, or otherwise; what is the fact?

A. No, sir.

Q. What was there about this movement that was peculiar?

A. It was faster than usual that day.

Q. What was the usual and customary speed of moving the train along there under the conditions and surroundings that were there at the time?

A. Oh, about six miles an hour.

Q. What kind of a stop signal did Mr. Rogers give there at that time?

A. A quick stop signal—emergency.

Q. Do you have any other name for it, you railroad men?

A. I don't know.

Q. Speak of it as a washout signal?

A. Washout or emergency.

Q. What is an emergency signal?

A. It is to stop quick.

19 Q. Well, how quick? What do you mean by emergency?

A. That is to stop as quick as they can stop them.

Q. What brakes were being used in this switching operation?

A. On the engine.

Q. There were no brakes, the air was not coupled in on the train, of course?

A. No, sir.

Q. What was the usual and customary method of stopping in making similar switching movements in the yards there at that time, the usual and customary kind of a stop?

A. Well, slow stop signal.

Q. Have you been on some trains and moving along when an emergency stop signal was given and obeyed?

A. Yes, sir.

Q. What effect does it have upon a man upon the top of a train?

A. Jar him off if he isn't on his guard.

Q. Is it easy or difficult to keep your feet?

A. Difficult to keep your feet.

Q. What is the effect when the ordinary stop is made?

A. It don't jar you at all.

Q. While I am on the question of signals, will you kindly indicate to the jury here, Mr. Holden, the ordinary and usual stop signal with your hands? Give it as they usually give it.

A. (Motioning.) Just slow.

Q. It is an outward motion with both hands?

20 A. Yes, sir.

Q. And then do the hands come down?

A. Yes.

Q. Give the emergency or quick stop signal.

Witness illustrates.

Q. It is a quick, downward, hard motion, outward and downward. I suppose you saw and observed and could see the whole surroundings there. What, if anything, was in the way of the train there as it backed up, either person or car?

A. There was nothing.

Q. What, if anything, in the way of any danger to the train could you or did you see or observe there up to the time of the emergency signal?

Mr. Janes: Just a moment. Objected to as calling for a conclusion or opinion of the witness. I think the witness should state the facts that existed there.

Mr. Anderson: The only purpose I want is to lay the foundation to show that there was on occasion for the emergency signal.

The Court: I suppose he can only state what the condition of the track was there.

Q. You have already testified that the car that you were on ran down fifteen or twenty car lengths?

A. Yes, sir.

Q. How long have you railroaded?

A. Around six or seven years.

Q. By the way, how was this track that you were running on as to being upgrade, downgrade or level, speaking substantially at the same place where the train was?

A. Kind of downgrade.

21 Q. When I speak of it I mean counting from the engine down to the rear of the train up to the time of the emergency signal.

A. It was level.

Q. Where did the downgrade that you have spoken of—

A. From there down.

Q. So, up to the time of the signal, the train was on a level track.

A. Yes, sir.

Q. Take the rest of the track from there on, when you speak of it being down grade—much, little or what is it?

A. Well, just enough after you start the cars, they will run down.

Q. So that in backing up the train at that place and the car being cut off when it was, was there anything to prevent the car running down as far as you wanted it on a movement of five or six miles an hour?

A. No, sir.

Q. What was there around or anywhere about this track or train as observed by you that in any way endangered the train or its movement so as to require the train to be stopped suddenly or in emergency?

Objected to as calling for an opinion or conclusion of the witness.

The Court: I suppose he can tell what if anything he observed there.

Q. Well, what did you observe there at the time of this emergency signal and stop as to the track? Was there anything out of the ordinary?

22 A. No, sir.

Q. I take it that the cars in this train were all coupled with the usual automatic couplers?

A. Yes, sir.

Q. Now, speaking with reference to the relative position of the cars and backing up, as you were backing at that time, would the slack be in or out?

A. In.

Q. And by "in" you mean pressed up—

A. The cars against each other.

Q. Ordinarily, about how much play or slack do you find between each two sets of cars?

A. Around six inches to each drawbar.

Q. Around six inches to each draw-bar?

A. Yes.

Q. In order to be clear, do you mean by that—There are two drawbars, of course, that come together?

A. Yes, sir.

Q. Do you mean when they are stretched out that there would be six inches or twelve inches more space between the cars than when they are pushed up?

A. Well, there would be more after they are stretched out.

Q. How much more?

A. Well, there would be about six inches when the train was stretched out, and they would be six inches in.

Q. By six inches to a drawbar, you mean there is about six inches slack or play between each two cars?

23 A. Yes, sir.

Q. What kind of brakes were on the engine? so as to have it in the record.

A. Air-brakes.

Q. Do you happen to know yourself whether they were the straight air or the automatic?

A. I couldn't say.

Q. You don't know. And who has charge and control of the air-brakes or brakes on the engine, the manipulation of them?

A. The engineer.

Q. With a little handle, valve, that he has there. And when he sets the brakes, what does he do? how does he do it?

A. Well, turn the valve.

Q. If it was straight air, he puts air in; if it was automatic, he draws it out; is that right, or don't you know?

A. I don't know.

Q. At any rate, he turns a valve and that sets the air-brakes on the engine?

A. Yes, sir.

Q. Now, what has been your observation with reference to the slack when you are backing up, as you were at this time, what becomes of it, this slack that is pushed in?

A. The slack drops in under the cars.

Q. As you are backing up, you said the slack is all in, the cars push in together?

A. Yes.

Q. When the brakes are set on the engine as they were at this time what becomes of the slack between the cars?

24 A. It stretches out.

Q. Where does it stretch out first, between what cars?

A. Between the first car behind the engine.

Q. And then back to the rear. Have you observed, in your railroad experience in backing as they were backing at this time, and the brakes are set suddenly, what effect it has upon the rear of the car—on the rear two or three cars?

A. Yes, sir.

Q. What is the effect following such a movement of the train as was made at this time?

Objected to as immaterial.

Mr. Anderson: At the moment that the slack ran out back to the rear car, I mean next to the rear car. Of course the rear car was uncoupled.

Q. When the slack ran out on the next to the rear car, were you looking at that car at that moment so as to observe at that time anything about the slack or the effect of the slack running out?

A. I wasn't looking at that car.

Q. What is the natural effect of a stop made as this was stopped upon the rear car?

The Court: Under these conditions, he may state what the usual—

Q. You may answer.

The Court: I think probably he had better take into consideration the character of the train, the speed—

Mr. Anderson: Well, I will put the question in this way:

Q. Before I do that, what sort of a day was this, whether it was a cold or a warm day?

25 A. It was kind of a warm day.

Q. Had you observed and noticed as to how the cars that you were switching ran, as to whether they were stiff or easy?

A. They ran good.

Q. Now, taking into consideration and basing your answer upon these facts as are in the record, namely, that this track was level up to the point where the stop signal was given and you had fourteen cars in the train after uncoupling the rear car, and they were backed up at a speed of twelve to fifteen miles an hour, and an emergency signal is given, a stop is made and the slack is all pushed in up to the time the engine-brakes are set and then the slack runs out, as you have said, beginning at the engine and back to the rear; under those conditions as observed by you, in your railroad experience, what effect does the running out of that slack have upon the two rear cars?

A. It has an awful jar to them.

Q. And when you give an ordinary stop signal and make an ordinary stop under like conditions—and I mean by that on the same kind of a track, the same sized train, running at the same speed and an ordinary stop signal is given and an ordinary stop is made slack runs out—what effect does that ordinarily have upon the two and the slack runs out—what effect does that ordinarily have upon the two rear cars?

Mr. Janes: Just a minute. I don't know that there is any foundation laid, that the witness knows what effect it would have under these conditions, running at 12 or 15 miles an hour. If he does know, I haven't any objection.

26 Mr. Anderson: He has testified he worked there about six years,—(to the witness): didn't you say?

Witness: Yes.

Mr. James: As a switchman?

Mr. Anderson: As a switchman.

Witness: As a switchman and on the road, both.

Q. How much of this time as a switchman in yards?

A. About a year.

Q. And in braking on the road would you have frequent occasions to switch and ride trains?

A. Yes, sure.

Q. And have you been on trains frequently——

Mr. James: No objection.

Q. You may answer the question, what the effect would be upon the two rear cars moving as they did at this time, giving the ordinary stop signal and making the ordinary stop?

A. Just the same as standing on the floor. There ain't no jar to them.

Q. Now, you have already said that you and Ward and somebody else—who was it—was field men?

A. I couldn't recognize his name. He is here.

Q. Is it Milander?

A. No.

Q. Anyway there was three men. Now, what is the fact as it existed there at that time as to whether you field men had certain specified work to keep at or whether you each took cars and rode them in as your various movements were made as you happened to be in position? which is it?

A. Just wherever you were.

27 Q. And what was the fact as to the person that was to ride cars in that were being kicked under a situation existing as it existed then, you down on the ground and Ward up on the train, on that second or third car, and a kick is to be made under those conditions as they existed then? Who would be the person ordinarily to ride in the cut then?

A. The man on top of the cars.

Q. And by what means would the man on top of the cars ascertain the number of cars to be cut off and kicked? how would he get that information as the work was carried on there?

A. Well, from the sign——

Mr. James: Just a moment.

A. I mean when done in the usual and customary way.

Mr. James: Well, I have no objection if that is to be followed by a question that this man knows that this was being done in the usual way at that time.

Mr. Anderson: Which man?

Mr. James: This Witness, and that he got this information, but it seems to me that there is no foundation for any testimony of this kind.

Mr. Anderson: Do you mean that Ward knew it was done in the customary way?

Mr. James: Yes, and got the information from Rogers. This man can't testify to that.

Mr. Anderson: He can testify to facts that would indicate it,

facts as to duties, what Ward would be expected to do and what Ward was doing.

The Court: You can show what signals were given.

28 Q. You may answer as to the source, where he would get his information as to the number of cars to be cut off.

A. From the foreman.

Q. And by what means?

A. After the signal of one car was cut off.

Q. And when you were making a switching movement of this kind and you or any of the field men were on top of the train, who if any of the men watched for that information?

A. The foreman.

Q. And when the car signal was given, and as the work was customarily carried on there, if the man on top of the train was not on the car or on the cars to be cut off, what would be the next movement of the field man on top of the train after the car or car signals were given?

A. To get on that car.

Q. Was Ward on this last car when this car signal was given?

A. No, sir.

Q. I think you have testified he was on the second or third car?

A. Second, yes, but he wasn't on this one car.

Q. Then as soon as that car signal would be given and there was a man up there, as Ward was, at what time, as the work was customarily carried on, would the stop signal be given?

A. After the man would be on the car.

Q. When in fact, that is, how quickly after the one-car signal was given, did Rogers give this emergency stop signal? How quickly did one signal follow the other?

29 Objected to as no foundation laid.

Question withdrawn.

Q. You have already testified that you saw the car signal given?

A. Yes, sir.

Q. And how close were you to Rogers at that time?

A. About eight or ten feet.

Q. You may state whether or not you saw the stop signal given that you have testified to, that he gave an emergency stop signal.

A. Yes.

Q. How quickly after he gave the car signal did he give the stop signal?

A. Right away.

Q. As you observed the time that elapsed between the two signals, assuming that Ward was in the center of the second car, you may state whether or not Ward had time to get from his position over on the first car before the stop signal was given.

Objected to as calling for a conclusion or opinion of the witness, and assuming facts not involved in this case at all, as to what this man Ward was doing at that time.

Q. Up to the time of the giving of these signals, the car signal,

rst, the car signal, state whether or not you observed Ward so as to be able to tell whether he was still standing or was moving.

A. He was still standing.

Q. I will ask you whether then he had time to get from his position in the usual and customary way of doing that kind of work, in moving, if he had time to get from his position over on the first car before the stop signal was given?

Objected to as no foundation laid.

The Court: I suppose he can state how long a time elapsed.

Mr. Anderson: Well, I suppose that is so.

Q. You have already stated cars were 36 to 40 feet in length.

Mr. Anderson: I think I have covered the ground anyway. He did one followed right after the other. I will not go into that any farther, but I will go into this:

Q. You say you went over to the car and rode it in?

A. Yes, sir.

Q. This car that was cut off. When did you start to the car with reference to the signals given by Rogers, as nearly as you can tell us?

A. Right after he give the stop.

Q. About how far were you from the car, from the ladder that you were going to get on?

A. Well, the car was backing by us.

Q. How far did you have to move before you got to the ladder?

A. About fifteen feet.

Q. How did you go—walk or run or how?

A. Run.

Q. How fast did you go? Tell the Court and jury and the attorney how fast you went to get to that car?

A. Well, the car was going at the rate of 12 or 15 miles an hour, and a man had to go that fast to catch it. I can't tell how fast—I didn't—

Q. What I mean is, in order to make it clear, which end of the car was the ladder on which you had to go to?

A. The upper end.

Q. Towards the engine?

A. Towards the engine.

Q. That is, there was two ladders on each freight car on diagonal corners?

A. Yes, sir.

Q. You have said that you were away about fifteen feet. Now, when you started towards the ladder, (I suppose you started towards the ladder) where was the ladder—right opposite you or up towards the engine, or which way?

A. Up towards the engine.

Q. And which way did you run when you went to position, which way did you run?

A. I ran right ahead because the car—the rear end of it was coming towards me.

Q. What is the fact, when you ran right straight to the track, which got to that point first, relatively, to how they got there, you and the ladder?

Mr. Janes: To what point?

Q. You say you ran right across to the track; is that the way you ran?

A. Yes, sir.

Q. Which got there first, the ladder or you?

Objected to as indefinite.

Q. Let's get is clear: Did you run towards the track direct or did you go on an angle?

A. I ran right straight.

Q. Where did you catch the ladder—there or somewhere else?

32 A. I caught it right straight from me.

Q. Which got there first, you or the ladder?

A. We both met right there together.

Mr. Janes: I will admit they had to meet there to get on the ladder.

Mr. Anderson: Not necessarily. He might have gotten there half an hour before if the train was far enough away and waited for it. This testimony is offered largely and has a bearing upon whether Mr. Ward had a chance to get over the twenty feet on the other car, unless he ran and ran hard.

Q. Mr. Holden, will you tell this Court and jury when you saw and observed as you got, to the car and to the ladder, particularly with reference to Ward or any accident. Just tell them in your own way?

A. When I just caught the car there, the cars was just separating and I just caught the car, and I noticed there was something (motioning) when the cars separated.

Q. You noticed something, and you motioned your hand down?

A. Yes, I noticed something—object going down right by me just as the cars separated.

Q. And you may state whether or not you knew at that time what it was.

A. I didn't know.

Q. As nearly as you can tell us, at the time you saw this object right opposite you,—when you say opposite you, where do you mean with reference to the space and track? You didn't designate.

Where was this object when you saw it?

33 A. It was right in about the center of the cars going down.

It was just about the center of the cars. I was still on the ground when it went down.

Q. You say center of the car; do you mean in the center of the end of the car between the rails?

A. Between the cars.

Q. Did it go down between the cars?

A. He went down between the two cars and I was still on the ground.

Q. How far had your cars separated from this other car or the end of the train when you saw this object go down between the cars?

A. About four feet.

Q. Who pulled the pin? Who did the uncoupling of the car?

A. Duffy, I think was his name, the pin-puller.

Q. You have already testified you rode the car down and it stopped down there fifteen or twenty car lengths. Where did you go then?

A. I come right back.

Q. And when you came back, where was Ward?

A. They had just taken him out from in under the cars.

Q. On the engineer's or fireman's side?

A. The engineer's side.

Q. About how much time elapsed from the time that you started up, as you have said, on this car to take hold of the ladder and the time that you got back to where Ward was and they had just taken him out from under the cars, as nearly as you can estimate the time?

A. It was around five minutes or more.

34 Q. Did you go to Ward when you got back there?

A. Yes, sir.

Q. You may state whether or not he was then dead or still living.

A. Still living.

Q. How long did he live after you got back to him?

A. Three to five minutes.

Q. And were you there when he died?

A. Yes, sir.

Q. Did you notice and observe, at the time when you got back there, so as to be able to tell us how far the rear of the train had moved over the point where you got to the ladder, or where the cars separated, about how many car lengths had they moved over?

A. About four cars.

Q. Were the switchmen at that time paid by schedule wages?

A. Yes, sir.

Q. What were the wages for the day crew?

A. Thirty-five cents an hour.

Q. What was it, how many hours a day?

A. Ten or more.

Q. Ten working hours?

A. Ten working hours and more.

Q. Work Sundays?

A. Yes, sir.

Q. You have stated that the men on top would be the men to ride the car in, but that you went over and rode the car down. Just tell the jury how you happened to take and ride this car in at that time.

35 A. I seen there was nobody on this rear car after the stop signal was given.

Q. So you went and rode it down?

A. It was my duty to ride the car.

Cross-examination.

By Mr. Janes:

Q. You say that Mr. Ward lived from three to five minutes after you got back?

A. Yes, sir.

Q. Did he regain consciousness?

A. No, sir, he never come out.

Q. While you were there he was not conscious at any time?

A. He was always unconscious.

Q. Always unconscious?

A. Yes, sir.

Q. And to ride a car down, going twelve to fifteen miles an hour, and get off of that car and walk back fifteen to twenty car-lengths (which would be four or five hundred feet) took you about five minutes, did it?

A. Five or more.

Q. Did you run back?

A. No, sir.

Q. Didn't walk back?

A. I walked back at a good gait.

Q. Take your time to get back?

A. No, I didn't; I walked good and fast.

Q. Why did you walk fast?

A. On account to get back to see who it was.

Q. You knew that a man had been killed?

36 A. I knew that a man had been killed; that is all I did know.

Q. And you walked back at a good pace, knowing that fact?

A. Knowing that fact.

Q. And as I understand it, the cars were ordinarily moved, in making these switching operations, about five or six miles an hour?

A. Yes, sir.

Q. Is that true of making kicks? When they are kicking cars, do they move the cars five and six miles an hour?

A. Yes, sir.

Q. Is that the usual rate of speed of kicking cars?

A. The usual rate.

Q. These particular cars, you say, were moving from 12 to 15 miles an hour?

A. Yes, sir.

Q. And moved unusually fast?

A. Yes, sir.

Q. And this sudden, emergency stop signal was given by Rogers?

A. Yes sir.

Q. And stopped the car quickly?

A. Yes, sir.

Q. And the cars quickly. In other words, this train at this time was being handled in an unusual manner?

A. Yes, sir.

Q. Both as to the stopping of the cars and the rate of speed that the train was being run?

A. Yes, sir.

37 Q. Both of those facts. This method of handling the cars, running them so fast, and stopping them so quickly, is what railroad men would speak of as rough handling of the cars?

A. Yes, sir.

Q. No question about that, in your mind, is there?

A. No, sir.

Q. Not at all. And it is your judgment, from what you saw there, that Mr. Ward was thrown from the top of the car on account of the rough handling of the cars, that is, the stopping of the car, this emergency signal, threw him off the top, is that it?

A. I didn't say he was thrown off; he might have been getting to the rear car and didn't have time.

Q. And caused him to fall?

A. And caused him to fall.

Q. As I understand, you have told the jury that this emergency signal given when the cars were moving that fast would cause a considerable jar on the entire train, wouldn't it?

A. Yes, sir.

Q. If a man didn't know it was coming, it was pretty apt to throw him off?

A. It was pretty apt to shake him off.

Q. You are not working for the Great Northern Railroad Company?

A. No, sir.

Q. The fact that you are not now working for the Great Northern Railroad Company would not in any way interfere with

38 your telling the truth in this case?

A. No, sir.

Q. And if you were working for the Great Northern Railroad Company you would likewise tell the truth, wouldn't you?

A. Yes, sir.

Q. It wouldn't make any difference with your story?

A. No, sir.

Q. That is true, isn't it?

A. Yes, sir.

Recess till 2 o'clock p. m.

Q. Do you know Mr. Howe, the claim agent for the Great Northern?

A. I just seen him once.

Q. And where did you see him?

A. He caught me down when I was working one day in the yard.

Q. And that was after Mr. Ward had been killed?

A. Yes, sir.

Q. And how long after it?

A. I reckon about a week, somewhere around there; I don't know. I haven't got no time set.

Q. Wasn't it the next day?

A. I couldn't say; I don't know. It was a few days afterward.

Q. You wouldn't say that it wasn't the next day after Mr. Ward was killed?

A. Yes; it wasn't the next day.

39 Q. It wasn't the next day, but it was while these facts connected with Mr. Ward's death were still fresh in your mind, was it not?

A. Yes, sir.

Q. And Mr. Howe had a talk with you at that time?

A. He never seen me until he came with the statement.

Q. Well, I understand at that time.

A. Yes, sir.

Q. And you talked with Mr. Howe about this accident?

A. Just a few little questions he asked me was all.

Q. And he wrote them down?

A. He wrote them down.

Q. Wrote down your answers?

A. Yes, sir.

Q. And after he had written down this statement, you read it over, did you not, the statement that he had written?

A. He kind of read them to me. He read them to me. I didn't read the paper myself.

Q. You didn't read the paper yourself? But did he write down what you told him?

A. That is something I don't know.

Q. Well, what he read back to you, was that what you told him?

A. Yes, I told him what he read back but I don't know what he had on his paper.

Q. I understand now. You, of course, don't claim that Mr. Howe practiced any fraud in connection with this matter?

A. I couldn't say.

40 Q. But what you told Mr. Howe at that time was true?

A. True, yes.

Q. Showing you Defendant's Exhibit 1, consisting of three sheets of paper, I will ask you if he name of F. J. Holden on the back of the first sheet of Defendant's Exhibit 1 is you- signature?

A. Yes, sir, my signature.

Q. And the name of F. J. Holden on the bottom of Defendant's Exhibit 1 on the second page is your signature?

A. Yes, sir.

Q. Is this your handwriting and your signature "I have read and"—what is that word? Read the last line and a half.

A. (Reading:) "I have read and find this"—What is this "five?"

Q. You wrote it, didn't you?

A. I wrote it in a hurry.

Q. That is your writing, isn't it?

A. I was down there—I don't know——

Q. Is that line and a half your writing?

- A. Yes.
- Q. And it is your signature?
- A. Yes, sir.
- Q. Read the last line and a half to the jury.
- A. "I read and find this statement correct."
- Q. And what is this word?
- A. "Five." I don't know what's "five."
- Q. Then you stated on Defendant's Exhibit 1, "I have read and five (find) this statement correct."
- 1 A. Well, I made that statement on account of my job.
- Q. Oh, you did?
- A. Yes, sir.
- Q. Didn't you just state a minute ago that you would tell the truth while you were working for the Great Northern Railroad Company the same as you would since you left the service of the Great Northern Railroad Company?
- A. Yes, sir, I did.
- Q. And you now tell the jury that you made this statement for the purpose of holding your job?
- A. Well, I had to make it.
- Q. You had to make it?
- A. Yes, sir, they compelled me to make it.
- Q. What did they say to you?
- A. They took me out of service.
- Q. When?
- A. After that.
- Q. How long after?
- A. About two weeks after that.
- Q. Was it not a month afterward?
- A. Why, it was two weeks or something like that afterwards that they took me out of service.
- Q. And were you not taken out of service because your eyes were defective?
- A. Well, yes, but I was left work two or three weeks longer.
- Q. You were taken out of service because your eyes were defective?
- A. I didn't know nothing about that at that time.
- 42 Q. But isn't that why you were taken out of service?
- A. I don't know. I couldn't find out.
- Q. Have you since learned that you were taken out of service because your eyes were defective?
- A. I don't know if I have or not.
- Q. Do you know whether or not your eyes are defective?
- A. I do not. I have been to a specialist and my eyes — O. K.
- Q. When you gave this statement, why, then, did they take you out of service?
- A. Well, I don't know what they had against me, anyhow.
- Q. If they forced you to give this statement, Defendant's Exhibit 1, and you gave the statement and told them what they wanted to know, why, then, did they take you out of service? Tell the jury.
- A. Well, they might have took me out on account of my eyes.

Q. And how long after it?

A. I reckon about a week, somewhere around there; I don't know. I haven't got no time set.

Q. Wasn't it the next day?

A. I couldn't say; I don't know. It was a few days afterward.

Q. You wouldn't say that it wasn't the next day after Mr. Ward was killed?

A. Yes; it wasn't the next day.

Q. It wasn't the next day, but it was while these facts connected with Mr. Ward's death were still fresh in your mind, was it not?

A. Yes, sir.

Q. And Mr. Howe had a talk with you at that time?

A. He never seen me until he came with the statement.

Q. Well, I understand at that time.

A. Yes, sir.

Q. And you talked with Mr. Howe about this accident?

A. Just a few little questions he asked me was all.

Q. And he wrote them down?

A. He wrote them down.

Q. Wrote down your answers?

A. Yes, sir.

Q. And after he had written down this statement, you read it over, did you not, the statement that he had written?

A. He kind of read them to me. He read them to me. I didn't read the paper myself.

Q. You didn't read the paper yourself? But did he write down what you told him?

A. That is something I don't know.

Q. Well, what he read back to you, was that what you told him?

A. Yes, I told him what he read back but I don't know what he had on his paper.

Q. I understand now. You, of course, don't claim that Mr. Howe practiced any fraud in connection with this matter?

A. I couldn't say.

40 Q. But what you told Mr. Howe at that time was true?

A. True, yes.

Q. Showing you Defendant's Exhibit 1, consisting of three sheets of paper, I will ask you if he name of F. J. Holden on the back of the first sheet of Defendant's Exhibit 1 is you- signature?

A. Yes, sir, my signature.

Q. And the name of F. J. Holden on the bottom of Defendant's Exhibit 1 on the second page is your signature?

A. Yes, sir.

Q. Is this your handwriting and your signature "I have read and"—what is that word? Read the last line and a half.

A. (Reading:) "I have read and find this"—What is this "five?"

Q. You wrote it, didn't you?

A. I wrote it in a hurry.

Q. That is your writing, isn't it?

A. I was down there—I don't know—

Q. Is that line and a half your writing?

A. Yes.

Q. And it is your signature?

A. Yes, sir.

Q. Read the last line and a half to the jury.

A. "I have read and find this statement correct."

Q. And what is this word?

A. "Five." I don't know what's "five."

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41 A. Well, I made that statement on account of my job.

Q. Oh, you did?

A. Yes, sir.

Q. Didn't you just state a minute ago that you would tell the truth while you were working for the Great Northern Railroad Company the same as you would since you left the service of the Great Northern Railroad Company?

A. Yes, sir, I did.

Q. And you now tell the jury that you made this statement for the purpose of holding your job?

A. Well, I had to make it.

Q. You had to make it?

A. Yes, sir, they compelled me to make it.

Q. What did they say to you?

A. They took me out of service.

Q. When?

A. After that.

Q. How long after?

A. About two weeks after that.

Q. Was it not a month afterward?

A. Why, it was two weeks or something like that afterwards that they took me out of service.

Q. And were you not taken out of service because your eyes were defective?

A. Well, yes, but I was left work two or three weeks longer.

Q. You were taken out of service because your eyes were defective?

A. I didn't know nothing about that at that time.

42 Q. But isn't that why you were taken out of service?

A. I don't know. I couldn't find out.

Q. Have you since learned that you were taken out of service because your eyes were defective?

A. I don't know if I have or not.

Q. Do you know whether or not your eyes are defective?

A. I do not. I have been to a specialist and my eyes — O. K.

Q. When you gave this statement, why, then, did they take you out of service?

A. Well, I don't know what they had against me, anyhow.

Q. If they forced you to give this statement, Defendant's Exhibit 1, and you gave the statement and told them what they wanted to know, why, then, did they take you out of service? Tell the jury.

A. Well, they might have took me out on account of my eyes.

I didn't know anything about it at that time, I didn't know nothing about it.

Q. Do you want to tell the jury that they took you out of service on account of your eyes or on account of the statement that you made?

A. Well, that is up to them. I don't know what they took me out of the service for at the present time. I didn't know, and they took me off my engine one morning and made me make another statement.

Q. Did you make another statement?

A. I had to, yes.

Q. You made another statement other than this?

43 A. Yes, sir.

Q. Where is that?

A. I don't know where you got it.

Q. And two statements are the only statements that the Great Northern Railroad Company forced from you; is that true?

A. Yes, sir.

Q. That is all the statements that you signed?

A. One, the first one.

Q. What was the second one?

A. Well, that was right there. The claim agent——

Q. The second one is the yellow sheet of paper?

A. Yes; and the third one, I don't know whether there is another.

Q. Well, did you make three?

A. Yes, sir.

Q. Who got the third one from you?

A. That is more than I know who has got it now.

Q. Who had you make out the third statement, what man?

A. Well, they took me off the engine right there in the morning and made me go in and make one out. I don't know who it was.

Q. Let us get at this so that the jury will understand it. What was the first statement you made at that time?

A. On the day of the accident.

Q. On the day of the accident?

A. Yes, sir.

Q. Was that on this yellow sheet of paper?

A. No, sir.

44 Q. What was it on?

A. It was on a white sheet.

Q. Did they make you make out the statement on the white sheet of paper?

A. Yes, sir.

Q. And what you put in that, you were forced to put it in to hold your job?

A. Well, I had to put that in to make a statement out before they would leave me go back to work.

Q. And before they would let you go back to work you had to tell an untruth of what you knew was an untruth in that first statement, did you?

A. No, sir, I told about what occurred when I made out that little statement.

Q. What you stated in the first statement is true?

A. Yes.

Q. What?

A. Yes, sir.

Q. And what you stated in the second statement, is that true or false?

A. Well, I don't know why I didn't read that over, just put that down at the bottom. He read it to me and then I put that down at the bottom.

Q. Is what the second statement contains true or false?

A. Well, let me read it and I will tell you.

Q. We will come to that in a minute. But you had to make out the second statement to hold your job?

A. Yes, sir.

Q. And what the second statement contains, is that what
45 Mr. Howe put in there or what you told him?

A. I don't know. I never read it. He read it to me and he could have read it over and said what he wanted to.

Q. And what he read over to you, was that what you had told him or what he put down himself?

A. What he put down himself.

Q. And not what you told him?

A. I don't know what he put down. He could have read it back and he could have read it any way he wanted to, but he read it about the way I told him.

Q. He did?

A. Yes, sir.

Q. And what he read back to you was what you told him?

A. Yes.

Q. And did he tell you that you had to tell certain things or you wouldn't hold your job?

A. No, sir.

Q. What did he say to you?

A. He just asked me what occurred there and that is all I told him.

Q. Now, let me understand it. Where were you at the time that
Mr. Howe met you?

A. I was down in the yard.

Q. Anyone with you?

A. No, sir.

Q. Anyone with him?

A. No, sir.

Q. And what was the first thing that Mr. Howe said to you?

46 A. He wanted to know if this is Holden.

Q. And what did you say?

A. Yes, sir.

Q. And what did he say then?

A. Well, he come to me and wanted to know what about that accident to Ward.

Q. And what did you say?

A. I don't remember.

Q. Then you told him something about the accident?

A. Well, he asked me about the accident.

Q. Yes, sir, and then you told him about it?

A. Yes, sir.

Q. And then he wrote it down?

A. Yes, he started—took his pencil and began writing.

Q. And wrote down something.

A. Yes.

Q. And then after he had written it down, you signed the statement?

A. Yes, sir.

Q. Signed each page of the statement. Is that all that Mr. Howe said to you, what you have told the jury?

A. I think that is all he said. I never seen him since.

Q. And that is all he said to you at that time?

A. That is all he said.

Q. Yes, sir. Then will you please tell the jury what it was that Mr. Howe said that led you to believe that you had to tell certain things to hold your job at that time, if that is all he said? Turn around and tell the jury.

47 A. I didn't have to—I had only made that statement out—they forced me—the claim agent came to me and got that statement and then they took me off my engine and I then told as least as I could tell to get through with it.

Q. How did the claim agent force you when you have already told the jury that all he said to you was, "Is this Holden?" and you said, Yes, and then he asked you how about the accident and then you told him and he wrote it down. Now, will you tell the jury how he forced you to make this statement? Turn around and tell the jury.

A. They simply told me I had to make a statement, he wanted my statement. And just before that they got a statement there the day of the accident, and they told us we couldn't go back to work until we made one out, so the claim agent come there right after that.

Q. They told you they wanted a statement?

A. Yes, before we returned to work.

Q. Did they tell you that they wanted you to state something that wasn't true?

A. No, they didn't. I just made as least as I could make.

Q. And you didn't state anything that wasn't true?

A. No.

Q. Then why did you tell the jury here that they forced you to make this statement?

A. Well, to hold my job. I made it just as least as I could make.

Q. And to hold your job you thought you had to tell an untruth, did you?

48 A. I didn't tell an untruth.

Q. Reading from this statement, on the third page, did

you tell Mr. Howe this: "The accident was not due to any rough handling as the cars were switched the same as all others, and I know nothing further regarding the matter. I couldn't say whether he was standing still or walking, what his position was on top of the cars when I last saw him before the accident? Did you tell Mr. Howe any of those things?

A. I told him some of that.

Q. Did you tell Mr. Howe "The accident was not due to any rough handling?"

A. Well, I told him that on account I didn't want to get the rest of the men into trouble at the present time working.

Q. Then it wasn't a question of losing your own job now——

A. Well, it was.

Q. But it was a question of keeping the other men from losing their jobs?

A. And losing my own at the same time for getting in bad against the company.

Q. If you were still in the service of the Great Northern Railroad Company would you be on the witness-stand telling a different story than you have told today?

A. No, sir, I would tell the same thing.

Q. Well, you would have if you were still in the service of the company trying to hold your job, wouldn't you?

A. I wouldn't. I would tell what I told today when I would get up on the stand, but when the claim agent comes to me,
49 I don't figure they are nothing.

Q. You don't figure that they are anything?

A. No, sir. When I am like that, when I take the oath I will tell the truth. That is the time I get on and tell it.

Q. You think when you are working for a man and an accident happens, and he wants to find out how it occurred, that you are justified in lying to him because you are not put under oath; is that what you want to tell the jury.

A. Yes.

Q. Is that the kind of a man you are, Mr. Holden?

A. I will tell it when I take an oath to tell the truth.

Q. Did Mr. Howe read this to you: "The accident was not due to any rough handling, as the cars were switched the same as all others?"

A. He may have, but I just told him that on account of the way I didn't want to tell who it were.

Q. And then on the bottom of it you signed, "I have read and find this statement correct?"

A. I wrote that.

Q. Then you wanted to mislead the company, did you?

A. No, I didn't want to mislead nothing.

Q. Did you give a statement to the attorneys for Mr. Ward, a written statement?

A. Yes, I think I did.

Q. When were you first consulted by the attorneys for Mr. Ward or any of their representatives or agents?

A. Just a couple of months ago or so.

Q. You know Mr. Griswold?

A. No, sir. I don't know when I give the statement to him.

Q. Did you give him a statement?

A. I don't recognize when they came over. They got a statement from me some time or another.

Q. But you told Griswold the truth?

A. Who is Griswold?

Q. Well, assuming that he is an employe that works for Mr. Anderson, did you tell Mr. Griswold the truth?

A. I just told him what I told him right in the paper.

Q. And when you had Exhibit 2, that was also made out so you could hold your job, was it? this white sheet of paper.

A. I don't know if that is the first one or the second one.

Q. Is that the first one?

A. I could tell you by the date. What is the date on it?

Q. Is that your signature?

A. Let me see the date.

Q. Is that your signature?

A. Yes, sir. I want to see the date, the date of the month and then I will know if that is the first or second.

Q. Is that your handwriting—the statement?

A. Yes, sir.

51 Q. That is the first statement, isn't it, December 13th?

A. Yes sir, December 13th is the one.

Q. While Ward was on top of these cars coming down to the point where he fell off the cars did you say anything to Ward or Ward say anything to you?

A. No, sir.

Q. Not a word?

A. No, sir.

Q. Make any signs to you?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. Are you sure about that?

A. He didn't make—He made kind of a sign with his arms.

Q. Oh, you have changed your mind?

A. No, sir, I haven't changed it. He gave me kind of a sign that he—figuring on he would ride the first one. He done like that (illustrating). That is all the sign—he gave me kind of a sign.

The Court: What sign was it?

Witness: Kind of that he would ride the first car.

Q. A sign with his hand?

A. Yes, shaking his hands like that, that he would ride the first one.

The Court: The end car?

Q. The first one, you mean the end car?

A. He didn't figure on riding the end car, he figured on riding the first cut. He didn't know what the cut was at the time.

52 Q. How do you know he didn't know what the cut was?

A. There was no signal given him.

Q. How do you know there was no signal given him?

A. I was standing there right near the foreman watching him. The signals were given afterwards.

Q. Is that as true as other things you have testified to?

A. Yes, sir.

Q. You didn't pay very much attention to what Ward was doing, did you?

A. I seen him standing on the cars. I was looking right at him.

Q. Well, after he gave you this shake of the hand that you have told us about, did you pay any attention to him after that?

A. No, sir, I didn't, because then I seen the sign, Rogers give the sign and then he give the stop signal and then I seen there was only one car going to be cut off and there was nobody on it, and that is when I seen there was nobody on the car, then I made for the car.

Q. What side of the cars were you on? Were you on the same side of the car that Mr. Rogers was on?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

Q. Now, reading Defendant's Exhibit 1, to you, I ask you is this correct: "My name is F. J. Holden. I live at 1022 Hawthorne avenue and have been employed by the Great Northern Railway Company as switchman since December 12, 1912." Is that true?

A. Yes, sir.

Q. "On December 13th, 1912, I was working in foreman Rogers' crew on engine 396 and at about 10:30 a. m. we were switching a string of about fifteen cars in the C yard. I was on the ground alongside of the lead—" Now, what is the lead?

A. The lead switch track where they back down with the cars before they wheel off the track, the main track, kind of. Like this there is the lead and they swing off.

Q. Is the lead what this car in question that was kicked down on, is that the lead?

A. No. The lead is where—I call the lead on the straight track where the engine pulls on, not the switch-over, not running over the switches.

Q. So the jury will understand this examination and these locations, I will show you Defendant's Exhibit 3. Now, this is not drawn to scale, it is simply a rough sketch for the purpose of showing the tracks. The right-hand side is east and the left-hand side is west. And which way was the engine facing that day?

A. The engine was facing the other way.

Q. Facing east, was it?

A. Well, I don't know the directions.

Q. Well, is the general direction of the track east and west?

A. I think the yard stands that way. I wouldn't be positive on the way they are, I wouldn't be positive on the directions.

Q. And this straight line which is marked track 14 and track 11, is that approximately the way the track lies, those two tracks lie which are known as the lead?

A. Track 14 and 11?

Q. Track 14 and 11.

A. What is this in here?

Q. That is 14 switch there in the middle and these are supposed to be the tracks that run off to the northwest.

A. This is the east yard?

Q. Yes.

A. I call this the lead, this here (indicating).

Q. Now, this engine picked up some cars down on track 14, did it not?

A. Yes, sir. I don't know—14 or some of those tracks in there.

Q. Track 14; and then they took those cars and went by switch 14 over on to what is known as track 11, did they not?

A. Track 11, I think they did. That is the way they usually did.

Q. I understand this to be correct. I may be wrong.

A. I don't know. I wouldn't want to say positive because I didn't know the tracks there very good myself.

Q. And then this engine backed these cars up back down track 11 until you got to switch 14, if that is switch 14, and then went off on this lead that runs to the northwest?

A. Yes, sir.

55 Q. Mr. Ward's body was found practically at switch No. 16?

A. Somewhere around 15 or 16 switch.

Q. Wasn't it right near the 16th switch about three feet from it?

A. Well, them switches is—they are a little ways apart and I didn't—they are on the opposite side of the cars.

Q. How far apart are the switches?

A. Well, I never measured them; I don't know.

Q. Well, I know, but about how far?

A. Oh, about forty feet; maybe they are more.

Q. Well, now, where was his body found, at 14, 15 or 16 switch?

A. Around near the 15th or 16th switch.

Q. Well, don't you know?

A. I was by the cars. The switch was on the other side and I never looked at the switch.

Q. Did you go down to where his body was?

A. I was down there and picked—

Q. Did they take his body out on the side towards the 16th switch or away from it?

A. No, sir, the opposite side.

Q. The opposite side?

A. Yes, sir.

Q. Were you down there at all assisting in taking his body out, as a matter of fact?

A. No, sir.

Q. You didn't go down?

A. I didn't go down because I come back, I rode the car down and come back and they had the body taken away when I returned.

56 Q. Now, where were you standing with reference to the 14th switch when the train started to back up down on to this lead here where the switches 14, 15, 16, 17 and 18 are?

A. I was standing just about opposite the 14th switch.

Q. Which way?

A. I was standing between the 14th and 15th switch.

Q. And how far from the track?

A. From 12 to 15 feet.

Q. And where was the end car on this train standing when they started to back up towards the 14th switch?

A. Way up on the lead.

Q. How far up?

A. Well, I don't know how far. From 14 switch where they come up off of there and headed over on to 11.

Q. Do you know how far up?

A. I don't know. It is up there maybe eight or ten cars. I don't know, I didn't measure it. They go up to 14 and head over across the cross-over.

Q. I am asking you how far this end car was over the 14th switch just before they started to back up to go—

A. They backed up after they got off the 14th switch on to 11.

Q. This engine and cars were on track 14, were they just before Ward was killed?

A. They moved from track 14 over on to track 11. They come up from down in the yard on 14.

Q. Were you with the train?

A. No, sir.

57 Q. When they came up?

A. No, sir; I was standing near Rogers.

Q. And they went over the 14th switch?

A. Yes, sir.

Q. And then after they got over the 14th switch, they intended to back back on this track, did they not?

A. What do you call that—the lead down over them switches?

Q. We will call this track 18.

A. Is that over them switches?

Q. Well, it is the track that runs off from switch 14.

A. I know, but there is a lead before they hit the 14th switch. They don't switch the cars over them switches. They have a lead.

Q. Let's see if we can get this right: Was the train on track 14 just before Mr. Ward was killed?

A. They come up from the yard on 14.

Q. They came up from the yard on 14. And do you know what they intended to do after they left track 14?

A. They come over on 11.

Q. And for what purpose did they go on to 11?

A. 11, I don't know now how them switches stand; 11, I don't know which way—the switches are higher the other way. They may come up off 11. I don't know how them switches stand, but the way the switches run from 14, they run higher in numbers northwest up. The switch is numbered higher in one yard. There was from 1 to—I don't know,—14 and from 14 up to 24.

Q. Wait a minute. Assuming, as you say, they came up
58 from track 14, and assuming now that they did go on to track No. 11?

A. I don't know if they come on to 11. If they had come over on to the lead, if they come on to them other tracks, whatever this other lead was on the east riff. The second riff, I don't know what that lead was, the number of it. They are numbered from 14. When they come up higher—

The Court: Just answer the question.

Witness: The riff is two different yards and they are right together.

Q. If you will pay attention to these questions I think we will get along faster. To get on to the lead, as they call it, on which switches 15, 16, 17, 18 and 19 are, when the cars left track 14 where did they have to go?

A. They had to go up a cross-over.

Q. They had to cross the switch known as switch 14?

A. Yes, sir.

Q. And that was what this train was doing when it left track 14, was it not?

A. Yes, sir.

Q. It crossed the switch so as to get beyond that switch and then backed up on this lead, on the lead where switches No. 15, 16 and 17 are?

A. Well, they backed down the lead before they hit there. There is a lead before they hit them switches. They go up—the 14th switch is away up.

Q. Well, as I understand it, they went by switch 14, did they, when they left track 14?

A. Yes.

Q. They had to get by switch 14 before they could get on to the lead where tracks No. 14, 16 and 17 are, didn't they?
59 They had to get beyond this 14th switch?

A. Yes.

Q. They had to get beyond that?

A. Yes, sir.

Q. Did this train have any work to do beyond the 14th switch?

A. They just backed down that lead.

Q. So that they could get back, get the cars down on to this track where the 15th and 16th and 17th switches are?

A. Yes, sir, back down the lead on to them switches?

Q. Then it wasn't necessary for that train to run any further beyond the 14th switch?

A. Where is the 14th switch? Isn't that the 15th?

Q. Then it wasn't necessary to go any farther beyond switch 14 than just to clear switch 14, was it?

A. They had to cross over the 14th switch.

Q. They had to clear it?

A. Yes.

Q. And that is what these cars did, didn't they?

A. Yes, sir.

Q. Just crossed over it?

A. Maybe they went a couple of cars over. They were coming up off of 14 and they might have pulled her up by us. They went by Rogers and I over switch 14.

Q. And you say they might have pulled just a car or two beyond the 14th switch?

60 A. Just a car or two?

Q. Yes.

A. Yes. I was ten to fifteen cars from the 14th switch.

Q. What is the number of the switch that opens the track on which tracks numbers 15, 16, 17 and 18 are?

A. I think it is 15, the first switch.

Q. Now, going ahead with this statement, let us see if we understand this: "On December 13, 1912, I was working in foreman Rogers' crew on engine 396, and at about 10:30 a. m. we were switching a string of about fifteen cars in the C yard. I was on the ground alongside of the lead as this string pulled out on it, and just as they started to shove the string to make the first cut, switchman Ward who was on top of either the second or third car from the end where cut was to be made, give me a signal that he would ride the first cut, so I paid no more attention to him." Is that all true?

A. Yes, sir. I didn't pay no attention to him.

Q. —"but as the first cut was a one-car cut and I noticed there was no one on it, I started for it and just as I caught it and started up the side ladder, I noticed something falling between the car I had caught and the next one to it, or in between the cars where the cut had been made, but I paid no further attention to it until I got up on top of the car, then I looked back and saw a man rolling over and over under the end car of the string. All I could see of him was his feet, so I concluded that was what I noticed falling, and later on going back to where the accident happened I found
61 it was Ward who had been run over, but as to how he come to fall I could not say." Now, is that what you said?

A. Yes, sir.

Q. —"but as to how he came to fall off I couldn't say?"

A. I couldn't say.

Q. It wasn't due to rough handling or sudden stop?

A. I don't know if it was a jar. I didn't get any or I didn't get no jar of the cars but the one car and I didn't—And when I got up on the car I looked back, and I don't know if he stepped off or was making for that one car or stepped off or was jerked off.

Q. But this is all true down to the present time, is it?

A. Yes, sir.

Q. —"and the last I saw of him before the accident was when he give me the signal that he would ride the first cut. At that time he was on top of either the second or the third car from the end of the string, or on top of the one he fell from or the next one to it." Is that what you told him "the next one to it?"

A. Well, it was the second or third car I told him he was on.

Q. I will read it again: "At that time he was on top of either the

second or third car from the end of the string or on top of the one he fell from?"

A. Yes, sir.

Q. —"or the next one to it." Is that what you told Mr. Howe?

62 A. Yes, sir. He was on the second or third head car—the rear cars.

Q. There is nothing false thus far, then, is there?

A. No, sir.

Q. Then you didn't have to say this to hold your job, did you?

A. I don't know what he wrote in it. I never seen the statement, and that is all what I told him.

Q. "I didn't get the numbers of any of them so I could not say as to that, and I made no examination of the cars so could not say as to their condition except from what I saw of them they appeared to be all right?"

A. Yes, sir.

Q. The cars appeared to be all right, and yet the brake on this other car that you have told the jury about this morning, wasn't all right?

A. Well, I meant them cars that was in the string. I made a statement that I couldn't get the brake—the brake wouldn't hold on it.

Q. Did you make that statement to Mr. Howe?

A. I don't know if he asked me. I told him.

Q. Or to Mr. Anderson's question?

A. No, sir, I don't know if I did or not. If they got it they got it on the paper.

Q. All right, we will read on, then. "The accident was not due to any rough handling as these cars were switched the same as all others, and I know nothing further regarding the matter."

A. Them cars was running fast at that time, faster than usual.

63 Q. Then the only thing that is not true in this statement is your statement in here that these cars were not roughly handled. All the rest of it is true?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. "I know nothing further regarding the matter. I could not say whether he was standing still or walking or what his position was on top of the cars. When I last saw him before the accident."

A. Yes, sir.

Q. So, then, to hold your job you put in that statement that the cars were not roughly handled?

A. Yes, sir.

Q. And the rest of it is true. And that is the kind of a man you are, is it?

No answer.

Defendant's Exhibit 1 offered and received in evidence as a part of the cross-examination.

Q. Now, Mr. Holden, as I understand it, you and Mr. Rogers were standing near what switch when the cars started to back up?

- A. Near the 15th.
Q. Near the 15th switch. And where was Mr. Duffy?
A. Standing in front of Rogers towards the engine.
Q. That is nearer the 14th switch?
A. Yes, up at the lead.
Q. Then you were standing with Rogers near the 15th switch and Duffy was standing closer down to the 14th switch; is that right?
A. Let's see.
Q. You don't seem to know much about that.
A. You have got the 14th switch way up here instead of re. You have got the 14th there and I never can get that. There a lead from the 14th switch leads this way farther than any other ck.
Q. Well, we will get that from the other witnesses.
A. The map isn't drawn right.
Q. I don't think it has anything to do with the present question. t Mr. Duffy was standing closer to the engine than either you or gers were; is that true?
A. Yes, sir.
Q. And wasn't there a curve in the track between where you were nding and where the engine was?
A. No, sir.
Q. What?
A. No, sir. I was standing right out there on the lead. There two leads there. I wasn't standing on the curve; from the 15th wn that way is the lead.
Mr. Anderson: I am perfectly willing to get the blue-print and u can question him further. You can go on with the rest and put m back. I am perfectly willing when you get the blue-print.
Mr. Janes: I think it would be more satisfactory, may it please e Court. I think that is all for the present.

O. N. WARD, Sworn on behalf of plaintiff, testified:

By Mr. Anderson:

- Q. Mr. Ward, you live in Mankato?
A. Yes, sir.
Q. Living there now, I believe?
A. Yes, sir.
Q. For a number of years. I have forgotten, but I believe you e a locomotive engineer?
A. Yes, sir.
Q. Are you now in service?
A. Yes, sir.
Q. On what road?
A. The Omaha.
Q. And how long have you been an engineer?
A. Since 1892.
Q. This is your son that this action is about?
A. Yes, sir.
Q. What is his name?

A. William. William was 27 years old.

Q. 27 years old when?

A. In September. I think it was the 7th day of September.

Q. Of what year?

A. 1883, wasn't it? He was 27 years old anyhow, I know.

Q. Well, he was 27 years old when he was killed?

A. Yes, sir.

Q. The September before, as you remember?

A. Yes.

Q. And how was he as to his general condition of health, physique?

A. Yes, sir, he was in good health.

Q. And about his habits—good or bad?

A. Yes, sir, he had good habits, always had good habits.

Q. Are you a man of family of any size?

66 A. Yes, sir. Twelve children, I had twelve.

Mr. Janes: I ask to have the witness' answer stricken out as immaterial.

The Court: I think that is immaterial.

Q. How long had your son been railroading?

A. He had been railroading since he was twenty years old.

Q. During that time what was the fact as to the time that he would be in service and the time he would be idle?

A. Well, it would be just like all other railroad men, whenever there was work for him he would work.

Q. That is rather indefinite; as to whether he was in service most of the time?

A. Yes. He could always find work; when he didn't get it on one road, why he would go to another, slack business, you know.

Q. Was he living at home, or did he work out of Mankato at all?

A. Well, yes, he worked out of Mankato for about a year on the Omaha.

Q. Did he live at home then?

A. Yes, sir.

Q. And did he live with you at home until he went to railroading?

A. Oh, yes, always when he made his home there, when he would come to Mankato, you know.

Q. And when he was working in St. Paul, I suppose he *staid* in St. Paul?

A. When he was working out of here he would stay there, most generally made his home with my sister.

67 Q. What is the fact in regard to the amount, if any, that he paid to you or to your wife out of his earnings, so far as you can tell or remember?

Mr. Janes: I object to the question insofar as it calls for how much money he paid to the mother as being incompetent.

It is admitted that the son died without leaving children.

The Court: You can show what amount the boy contributed toward the household expenses or to the father and mother. To-

gether, I suppose the contribution was made to them, to the home, wasn't it? They were living together?

Mr. Anderson: Oh, yes. What he paid the father and also paid the mother?

The Court: Well, I suppose whatever went into the house primarily for the benefit of the father went into the house. It is your understanding that this boy made specific contributions to the mother and specific ones to the father?

Mr. Anderson: Not for specific purposes, but simply to his mother and to his father, and it went in to the support of the family.

The Court: You can show what the amount was.

Q. Well, just state, as far as you can and as accurately as you can the amount your son contributed towards your support.

A. Well, he used to contribute between ten and twenty dollars a month to me and then lots of times a week afterwards, why his mother would get a check for ten dollars the same month, and of course—

68 Q. Let me ask you this: The money that came to the mother, what was that used for? for the mother personally, or did it go into the general fund to support the family?

A. No, it all went to the support of the family and pay for our home.

Q. And as accurately as you can remember, what amount per year did he thus contribute out of his earnings?

A. To me and to his mother?

Q. Yes, that went in to the family?

A. I don't know. It must have been \$250 anyhow.

Q. Was your son a single man or married man?

A. He was a single man, always was single.

Cross-examination.

By Mr. Janes:

Q. Now, Mr. Ward, your son went railroading when he was twenty years of age, you say?

A. He went railroading, yes, I think he was between nineteen and twenty years old.

Q. What was the first road that he worked for?

A. Northwestern.

Q. And do you know how long he worked for the Northwestern?

A. Well, sir, he worked for them for about eight or nine months, I should judge.

Mr. Anderson: What is your age?

Witness: Fifty-two years old.

Mr. Anderson: And your wife's age?

69 Mr. Janes: Objected to as incompetent and immaterial. She is not a beneficiary.

The Court: We can take the testimony.

Mr. Anderson: Subject to the objection and decide it later.

Admitted that the mother is forty-six years of age, subject to the objection made.

Q. And when he was working for the Northwestern he stayed home, I understand, Mr. Ward?

A. No, he stayed home for awhile and then he was removed to New Ulm and then he lived with my mother there, boarded with my mother and my half brother.

Q. Now, then, since he began railroading, and during the time that he was railroading, do I understand you to say that the only time that he lived at home was the first few months when he was working for the Northwestern?

A. No. After he quit the Northwestern he went to work for the Milwaukee for—I don't know. Let's see: he was up there, I think, about three months, at Monticello, working for the Milwaukee, and then he came back and I got him a job of braking on the Omaha.

Q. When he started to work first, he went to work for the Northwestern?

A. Yes, sir.

Q. And he worked for eight or nine months for the Northwestern?

A. Yes.

Q. And during a part of that time he was living at home?

A. Yes, sir.

70 Q. And a part of the time he was living at New Ulm?

A. With his grandmother, my mother, yes.

Q. And what were you doing during that time?

A. Well, sir, I was running a switch engine, night switch engine in the Mankato yard, and firing.

Q. And what were your wages at that time?

A. Well, sir, my wages for the last ten years has been about \$77—about \$70, between \$70 and \$75 a month on the average.

Q. Some of the time you would have no work?

A. Well, lots of the time I haven't worked. There was three months last summer that I didn't work at all. I was laid up with the rheumatism.

Mr. Janes: I ask that the answer that he was laid up with rheumatism be stricken out

Stricken out.

Q. And during the time that your son was working for the Northwestern, how much did he earn per month?

A. \$60, I think.

Q. \$60?

A. I think so

Q. And when he was staying at home he contributed part of that money to you and his mother?

A. He give us the check when he was living at home.

Q. I am talking about the time that he first started to railroad?

A. Well, that is when it was, when he was living at home, when he went to work for the Northwestern, he would always come

71 home and give us the check.

Q. When he was living at New Ulm, what was done with the check then?

A. Well, he would get it cashed and send us some money, whatever money he had to contribute or to spare.

Q. And of course he contributed money to the grandmother?

A. Oh, he would have to pay for his board.

Q. Now, isn't it a fact that this boy was brought up by the grandmother?

A. I don't see how you can make that out.

Mr. Anderson: You just answer the question.

Witness: No.

Q. The grandmother lives here in St. Paul, does she not?

A. Yes, sir.

Q. At the present time?

A. Yes, sir.

Q. Did the boy go to school in St. Paul at any time?

A. No, sir.

Q. When did he leave school?

A. He left school when he was about 18 years old, I think. I don't know but what he did start to the German Catholic School here before we took him to Mankato, when he was a little bit of a fellow, I ain't sure. I think they did.

Q. Did this boy live with you more than to live with his grandmother down to the time of his death?

A. Sure he did.

72 Q. He worked for the Milwaukee after he had worked for the Northwestern, you say?

A. Yes, sir.

Q. And he ran out of Mankato?

A. No, sir, he worked for the Milwaukee at Monticello, in the roundhouse.

Q. And how much did he get then for his services?

A. I think it was \$55 or \$60 a month.

Q. And what were you doing during that time?

A. Well, sir, I was running a switch engine at Mankato.

Q. During the last ten years have you always run a switch engine?

A. Well, no. We have been set back, you know, and had to go back firing.

Q. Have you had a regular run at any time?

A. Nothing only the night helping engine there at Mankato, night switch engines.

Q. Have you ever been a fireman or an engineer on any of the regular runs?

A. Oh, yes.

Q. For how many years back has your son been contributing about \$250 a years to the family just prior to his death?

A. Well, about five years.

Q. About five years?

A. Yes, sir. That is, since he has got into the train service and got more wages.

Q. Now, let us see: Do you remember that on the 17th day of January of last year going down to the Great Northern Railroad

Company's offices and seeing the general claim agent, Mr. Kimball, and Mr. Dugan, and having a talk with Mr. M. L. Countryman, the general counsel of the Great Northern Railroad Company, about this case?

A. I don't know of talking with any gentleman down there only Mr. Dugan. That is the only man's name that I know. I talked with several other ones, but I don't know their names at all. I didn't know the gentlemen.

Q. Well, one of the men that you talked with was one of the attorneys for the company, you understood, did you not?

A. I did not, no. Mr. Dugan says, "I will take you in the other room and you can talk to somebody." I don't know who he was.

Q. And he was a dark-haired and dark-eyed gentleman about 160 pounds in weight?

A. I didn't take any notice what he was. I know he was smoking a pipe.

Mr. Anderson: Yes, that is Countryman.

Witness: I do know that.

Mr. Jones: I guess he has got the right man.

Mr. Anderson: The identification is complete.

Q. What kind of tobacco was he using?

A. It might have been Peerless or something like that.

Q. And for what purpose did you go down there, Mr. Ward?

A. Because I was asked to come down there to settle with the company.

Q. And Mr. Dugan and you had a talk about the amount that your son had been contributing to the family, did you not?

A. He asked me——

74 Q. I asked you——

A. Yes.

Q. And that talk was with Mr. Dugan; you remember that?

A. Yes, sir.

Q. And then Mr. Dugan took you into another room where that gentleman was whom we have identified as Mr. Countryman, on account of his pipe, and you had some talk with that gentleman?

A. Yes, sir.

Q. And in that conversation was there anything said by you about the amount that your son had been contributing for some three or four years before he died?

A. Yes, sir. He didn't mention three or four years.

Q. Well, for some period before his death.

A. Yes.

Q. And did you not tell Mr. Countryman and Mr. Dugan at that time that your son was contributing and had been contributing to the family about \$100 a year, as nearly as you could get at it?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Did you tell either Mr. Dugan or Mr. Countryman or Mr.

Kimball at any time that your son was contributing about \$100 a year, or words to that effect?

A. \$150 he gave me, about \$150 a year he sent to me, yes, sir.

Q. Now, I am asking you whether or not you told Mr. Countryman and Mr. Kimball and Mr. Dugan, either of these men, or all of the men, at any time that what your son was contributing to the family for the family was about \$100 a year, as nearly as you could get at it?

A. No, sir, I told him to me.

Q. Answer the question, yes or no.

A. No.

Q. You say no?

A. No, I did not.

Q. To refresh your memory, you told these gentlemen, did you not, what you thought you ought to have in settlement?

A. Yes, sir.

Q. And then you started in to figure out with them how much you were entitled to on the basis of the contribution that your son had been making to the family, did you not?

A. No, sir, I did not.

Q. Well, did they not tell you?

A. They done the figuring. I didn't know what they had to do. They done all the figuring and all the talking.

Q. You didn't do any of the talking?

A. Very little of it.

Q. Weren't there for the purpose of talking?

A. I was there for a purpose, yes, sir.

Q. And you told them how much you wanted in settlement, didn't you?

A. Yes, sir.

Q. And didn't they tell you that what you could recover would be based upon what your son was contributing to the family?

A. Well, that is what Dugan told me.

76 Q. Yes, that is what Dugan told you?

A. Yes.

Q. And then did you not tell these men how much your son was contributing?

A. Yes, sir, to me.

Q. You have answered the question. Did you not tell these men that all your son was contributing then to the family for the family was about \$100 a year?

A. No, sir.

Q. Then, of course, if these gentlemen should testify to that, they would be mistaken?

A. Yes, they would be mistaken, because I never mentioned no \$100.

Q. What was your son doing for—who was he working for during the year just preceding his death?

A. Well, he was working quite awhile for the Electric Light Company here in town.

Q. In St. Paul?

A. Yes.

Q. Which company?

A. I don't know which company it was. And he was working for a contractor here, a wiring house.

Q. What was the name of that contractor?

A. I don't know the name. My sister might know the name of him.

Q. Is that the same company as the Electric Light Company?

A. I think it is, yes.

77 Q. Now, I want you to tell the jury what different companies he was working for during the year just preceding his death.

A. Well, he was working for the Great Northern, for this here light company, and I think that he said he was working for the Northern Pacific.

Q. What other company? Well, just a minute. What was he doing for the Northern Pacific?

A. I think he was braking on a passenger. That is all that I know of.

Q. And during the year just preceding your son's death, how many times did you see him?

A. Well, sir, I think that he was home twice, and we seen him—we were down here three times and we seen him down here.

Q. That is, you went to his grandmother's here when you came down?

A. No, to my sister's. He was at my sister's then, boarded there.

Q. Any more times? That would be five times.

A. Then just a week—a couple of days before he was killed we met him at my son's out on West Seventh street.

Q. How much was he making when he was working for this Electric Light Company?

A. I couldn't say how much he did make there.

Q. How much was he making when he was working for the Northern Pacific Railroad Company?

A. I think he said he got \$70 or \$80, somewheres along there, \$72 or something like that.

Q. How long did he work for the Northern Pacific?

78 A. I don't know that. He would work there for awhile—just as I said before, he would work for one company for awhile until he got out of a job, got slack of business, and he would go to work for somebody else. He had great luck in finding—

Q. Just answer the question. What I want to get at is this: What I am trying to get at is what he was earning during the year just preceding his death. Now, do you know how long he worked for the Electric Light Company?

A. No, I do not know just exactly.

Q. Well, about how long did he work for them?

A. Well, I couldn't say. My sister might tell about how long.

Q. I am asking you if you know.

A. No, I do not exactly.

Q. And you don't know how long he worked for the Northern Pacific?

A. No.

Q. There were only three people or corporations that he worked for during the year just preceding his death?

A. I think that was all.

Q. And how much of that time was he out of employment?

A. Well, I don't think that he was out of employment very much, because he contributed right along to us.

Q. Well, how much of the time was he out of employment?

A. I don't know.

Q. Now, how did he send this money to you?

A. Well, sir, he used to send me money by postoffice order and lots and lots of times I got the money by mail.

79 Q. By check?

A. No, by mail, by putting the money right in, \$10 or \$15 in an envelope and send it.

Q. Did he send you a check?

A. Money order?

Q. A bank check?

A. No, sir.

Q. You never got a bank check?

A. No, sir.

Q. Can you tell us any date that you received a money order from him during the year just preceding his death?

A. Why, I couldn't tell the exact date, no, because lots of times his pay days ain't the same and it would be at different time, you know. Last year that he worked here he sent a good deal of money to me with Louis, my other son, because he was braking—

Q. You haven't any record of any money that he sent home, then?

A. Oh, yes. No, I have got nothing to show for it, nothing more or less than what I done with the money.

Q. During the year just preceding his death did he contribute any money to his grandmother for her support?

A. He didn't live with me.

Q. I ask you if you know during the year just preceding his death if he contributed any money to his grandmother.

A. Well, my goodness, how do I know?

Mr. Anderson: Do you know?

Witness: No.

80 Q. During the year just preceding his death did he contribute any money to the support of his sister?

A. His sisters at home?

Q. No, here in St. Paul.

A. He ain't got any sister—he didn't have no sisters here in St. Paul.

Q. Did he contribute any money to the support of his aunt here in St. Paul?

A. He gave her board money, is all I understand.

Q. Your son was 27 years of age?

A. Yes, sir.

Q. Are you positive that during the last year you received some money through the postoffice, that is, a postoffice money order, during the last year?

A. No, I ain't received any money from him since——

Q. I mean preceding his death.

A. Well, yes, I know we have.

Q. More than one?

A. I don't know for sure. I can't tell anything about it; I don't know for sure. Maybe he sent two or three to my wife through the postoffice.

Q. Did you used to get this money, you or your wife, regularly from him?

A. We always got some every month from him, yes, sir.

Q. Did you not tell Mr. Countryman or Mr. Dugan or Mr. Kimball, or all these men, that there was some months that you never received any money from him during the year just preceding
81 his death?

A. No, I didn't tell them anything of the kind about the year just preceding his death.

Q. Do you know where he was working during the year 1910, or the second year preceding his death?

A. I think that he was working in a copper mine at Anaconda.

Q. And how long did he work out there?

A. I don't know. He must have been there six months anyhow, five or six months.

Q. And while he was working at Anaconda, in the mine there, how much money did you receive from him each month?

A. Well, when he first went there, why I believe he got \$68 or \$70. He didn't give us so much when he first went there as he did afterwards. I think I got four checks from him.

Q. Four bank checks?

A. No, postoffice orders.

Q. Four postoffice orders.

A. Or one express. I think there was an express order, or something like that, from him.

Q. Did he ever send you a bank check?

A. I don't think he did.

Q. And what else did he do during the same year just preceding his death other than working in the mine at Anaconda?

A. I don't know, I am sure, where he was working, what he did do. It is pretty hard to keep track of where they are all the time.

82 Q. And where was he working during the third year preceding his death?

A. I think he was working on the Milwaukee out of Aberdeen.

Q. What was he doing there for the Milwaukee?

A. Braking and switching.

Q. What was he getting there, if you know?

A. I don't know. Standard wages.

A. You don't know?

A. I know he was——

Q. He got standard wages?

A. Yes, sir.

Q. Do you know what standard wages were then?

A. I don't know.

Q. And during this year what else did he do other than work for the Milwaukee?

A. I don't know. I don't know really how long he did work for the Milwaukee that year.

Q. You don't know how long he was out of work during the second year just preceding his death?

A. Well, he wasn't out of work very long at a time because he was always contributing something to us.

Q. How often did you hear from your son, either you or his mother, preceding his death?

A. Oh, on an average of three times a month, two or three times a month a card, once in awhile a letter. And then he used to write to his sisters frequently.

Q. Do you know Mr. A. J. Allen, who was agent for the Oregon Western Colonization Company? A. Mr. A. J. Allen, do you know him?

83 A. A. J. Allen?

Q. Yes.

A. Arthur, yes.

Q. I don't know what his first name is. Do you know a Mr. A. J. Allen?

A. I know Arthur Allen, yes, sir. He is a half brother to me.

Q. He is the boy's uncle, isn't he?

A. Well, I suppose so.

Q. How long since you have seen him?

A. Oh, it is about two years, I think. No, it is longer than that. He went to Fairchild. It is about two years ago.

Q. Now, isn't it a fact, Mr. Ward, that his grandmother took care of this boy and paid for his schooling until he became self-supporting?

A. No, sir.

Q. And isn't it a fact that after he became self-supporting that the money that he had left over and above his expenses, he sent to take care of his grandmother who had taken care of him when he was a little boy?

A. No, sir.

Q. That isn't a fact?

A. No, it ain't a fact. His grandmother has been living with her daughter for the last ten years.

Q. And isn't it a fact that the grandmother has no means or has had no means of support excepting what your son, Mr. Ward, contributed during those ten years?

A. No, sir.

Q. It isn't?

A. No, sir. I will bring my sister——

84 Mr. Anderson: I offer to show that the expectancy of a man 27 years of age, under the American mortality table, is 37.43 years.

Objected to as incompetent and immaterial to the issues in this case.

The Court: You make no point that that is not a proper figure?

Mr. Janes: No.

The Court: It will be received.

Mr. Anderson: I make the same offer as to a person of fifty-two years of age, under this same table, showing that his expectancy was 19.49 years.

Objected to as incompetent and immaterial.

Received subject to the objection.

Mr. Anderson: And as to one forty-six years of age, applicable to the mother, I offer to show that the expectancy, under the American table referred to, is 23.81 years.

Objected to as incompetent and immaterial, so far as the mother is concerned.

The Court: It will be received for the present.

F. J. HOLDEN, recalled on behalf of plaintiff, testified:

By Mr. Anderson:

Q. Mr. Holden, there is one question I forgot to ask you. When you came back to where Ward was lying, what, if anything, did you do in connection with Ward to assist?

A. Why, I went there and caught him by the shoulder and held him up.

Q. And what was Ward doing then, or what signs of life or anything?

85 A. There was no signs, he was just breathing, and his eyes were all rolling, kind of groaning.

Q. You say something about groaning?

A. Well, kind of a groan, kind of a moan, moaning.

By Mr. Janes:

Q. As I understood, Mr. Holden, you said that he was unconscious?

A. Yes, he was unconscious.

Q. Whereabouts had he been run over, what part of his body?

A. Right over across here (indicating across the abdomen).

Q. Across the stomach?

A. Across the stomach.

Q. Had he been run over any other part of him?

A. Not that I could see. He had a big Mackinaw coat on.

Mr. Janes: May it please the Court, that plat isn't here, and we don't want to delay matters at all. As I understand it, it is agreed between Mr. Anderson and myself that we may call this witness for cross-examination after we have opened our case, but that he is not to be considered as our witness.

Mr. Anderson: Oh, yes, cross-examine the same as though you had the plat here now. The plaintiff rests, with that understanding.

Mr. Janes: I think it should be understood here that after the cross-examination of Mr. Holden, that that should be the time at which we might make a motion to dismiss this action, if we desire, and that his testimony should be taken the same as though
86 we cross-examined him now. In other words, if I make the motion to dismiss at the present time, the Court hasn't before it all of Mr. Holden's testimony.

Mr. Anderson: Then I think we ought to finish before any such motion is made. I am perfectly willing to hear his motion now and the Court pass upon it and all the testimony given from Holden afterwards.

The Court: The motion, perhaps, might be recorded and argued and when the Court comes to pass on the motion it will take into consideration the further cross-examination of this witness.

Mr. Anderson: That is satisfactory.

The Court: By that time the plat should be here.

Mr. Janes: The defendant at this time moves that the action be dismissed for the reason that the plaintiff has failed to prove the allegations of his complaint, and having failed to prove any negligence on the part of this defendant.

Motion denied.

GUS B. McDONOUGH, sworn on behalf of defendant, testified:

By Mr. Janes:

Q. Mr. McDonough, where do you live?

A. At the present time, Kansas City.

Q. And what business are you engaged in at the present time?

A. Switching cars.

Q. For what railroad company?

A. Burlington.

87 Q. And is your business or occupation that of a switchman?

A. It is.

Q. And for how many years have you been such?

A. Fourteen years.

Q. Were you working for the Great Northern Railroad Company in the month of December, 1912?

A. Yes, sir.

Q. And where were you working at that time?

A. In the elevator, C yard.

Q. At the so-called Hamline yards?

A. Yes, sir.

Q. Were you working in the same switching crew or in the switch crew that Mr. Ward was working in at the time of his death?

A. Yes, sir.

Q. Do you recall who was in that switching crew?

A. Yes, sir.

Q. Who were they?

A. Rogers was foreman.

Q. Mr. Rogers was foreman?

A. Yes, sir. I was one of the field men; Ward was one of the field men. This man that was just on the stand was a field man.

The Court: Who were field men?

Witness: Ward and Holden and myself.

Q. And who else?

A. Duffy was pulling pins. And there was two switch tenders, Henry Milander, and I don't know the other's name.

Q. Mr. Roy, was that the other switch tender?

88 A. Yes.

Q. In the work that you were doing at that time, what were the duties of Mr. Rogers, the foreman?

A. To give signals.

Q. He gave the signals to whom?

A. To the engineer.

Q. Were there anyone else who was to give the signals other than the switch foreman Mr. Rogers?

A. Not unless there was any other occurrence, in case of danger, to give a stop signal, or whatever it was.

Q. Just preceding the time when Mr. Ward was killed, where was this switch-engine and cars?

A. They pulled up to make the switch to stop over 14 switch.

Q. And where had they come from?

A. Off of 14.

Q. Now, looking at Def'ts Ex. 3, I will ask you if that substantially in a general way, shows the location of the switch tracks and the lead tracks?

A. Yes, sir, I so understand it.

Q. Will you step down here. Where was this switch engine and these cars just before the accident? Will you indicate here?

A. Pulled them up out of here above this 14th switch.

Q. Pulling off of track 14?

A. Yes, sir, beyond 14 switch.

Q. Beyond 14 switch which is marked 14 here on this exhibit?

A. Yes, sir, and he was given a sign to stop.

89 Mr. Jones: Strike that out. I want to put the questions, if you please.

Q. And you say the engine and the cars pulled beyond the 14th switch?

A. Yes.

Q. How many cars were there in the train?

A. Fourteen.

Q. And which way was the engine headed?

A. East.

Q. The engine was headed east?

A. There were fourteen cars.

Q. And what track did you pull up on after you went by the 14th switch?

A. I never knew it by any other name than a switch track.

Q. Is that track in substantially the location as is shown on this plat as indicated, track No. 11?

A. Yes, sir.

Q. And is track No. 11 substantially a continuation of track No. 14?

A. Yes, sir.

Q. And extends substantially directly east from the 14th switch?

A. Yes, sir.

Q. How far beyond the fourteenth switch was this train pulled up?

A. One car length.

Q. One car length beyond the fourteenth switch?

A. Yes, sir.

Q. And was it stopped there?

A. Yes, sir.

Q. And what did you intend to do at that time, what operation were you engaged in?

90 A. Cutting the car.

Q. What was being done with these cars?

A. We were switching.

Q. And where were you switching these cars to?

A. Going to track 22.

Q. Where were you switching these cars to?

A. Down the lead.

Q. And looking at Defendant's Exhibit 3, is that lead substantially indicated by the line marked AB?

A. Yes, sir.

Q. And from this so-called lead being line AB, were there tracks that led off to the west?

A. Yes, sir.

Q. And were those tracks numbered 15, 16, 17, 18, 19, 20, 21 and 22?

A. Yes, sir.

Q. Did you have some cars in this train to place on any of the tracks along this lead, being the line AB on this Exhibit?

A. They were all to go down in there. That is, on the different tracks.

Q. They were all to go down there?

A. On the different tracks.

Q. And where were you going to put the end car of this train?

A. I am not positive. I think it was for track number 22. This Northern Pacific car.

Q. And what sort of a car was this?

A. An empty.

Q. It was an empty car?

A. A box car.

11 Q. And do you know what railroad company's car it was?

A. I believe it was a Northern Pacific.

Q. Do you know whether or not it was a new or an old car?

A. I couldn't say that.

Q. Did you see Mr. Ward while this train of cars was being moved from track 14 down beyond the switch number 14?

A. Not until I saw the legs on the ground and give a stop signal.

Q. Before the accident occurred?

A. Yes, sir. I talked to him.

Q. And before the train pulled up on track number 11?

A. Yes, sir.

Q. And while it was pulling up on track number 11 did you see Mr. Ward?

A. Yes, sir.

Q. And that is before he got to switch 14?

A. Yes, sir.

Q. And whereabouts was he at that time?

A. On the last car.

Q. On the last car?

A. Yes, sir.

Q. And what was he doing there if you know?

A. Well, he generally rode the cut out, the last man on top of the car.

Q. And what was he doing there?

A. Just standing there on the car.

Q. Did he know what was going to be done with that car, the end car, if you know?

A. Not that I know of.

92 Q. Do you know whether or not he was to ride this end car down on to this lead, that is, that track number 22 led off from, this empty car?

A. No.

Q. Did you have any conversation with Ward before the accident happened about riding any of the cars?

A. I told him the last car was empty.

Mr. Anderson: Wait a minute.

Q. Did you have such a conversation?

A. Yes, sir.

Q. I ask you now, whether or not, in your switching operations, you field men determine among yourselves what cars you shall ride down?

A. Yes, sir.

Q. Did you and Mr. Ward determine what car Mr. Ward should ride down, if any?

A. The second car.

Q. That he was to ride the second car down? Was there anyone to ride the first car down the track?

A. It wasn't necessary.

Mr. Anderson: One moment; I move to strike out the answer as not responsive and being a conclusion of the witness.

Stricken out.

Question read.

Q. Was there anyone who should do that?

A. When it was cold it was not necessary to ride an empty car. That is the instruction we got from the foreman.

Q. But referring to this particular car, the end car, was there any one who was to ride that car down?

A. No, sir.

Q. Was the second car a loaded car?

A. Yes, sir.

Q. And was it understood between you and Mr. Ward who should ride the second car down?

Mr. Anderson: Just a moment. You are asking for a conclusion.

Q. Who was to ride the second car down?

The Court: He already stated, Mr. Ward.

Q. Now then, after this train had pulled beyond switch number 14, as you have told the jury about, and stopped about a car length from the switch—what do you mean by a car length, how many feet would that be?

A. Anywhere from 36 to 40 feet.

Q. Then the end car of this train had stopped about 36 or 40 feet from switch number 14?

A. Yes, sir.

Q. What is the distance between switch 14 and switch number 15?

A. Well, it is over a car length. I should judge about 40 to 50 feet probably, the switch stand.

Q. And what is the distance between switch number 15 and switch number 16?

A. The same distance.

Q. And would that also be true of the distance between the switches 16, 17, 18, 19 and 20?

A. Yes, sir.

Q. They are all the same distance?

A. Yes, sir.

Q. After the train had moved beyond switch 14, as you told us about, what movements did you observe this train to make. Just tell the jury.

A. A backward movement.

Q. A backward movement?

A. Yes, sir.

Q. Did you see the signal given for this backward movement?

A. Yes, sir.

Q. Who gave the signal?

A. Rogers.

Q. Where was Mr. Rogers standing at the time that he gave the signal for the backward movement of the train?

A. On track 14, alongside of track 14.

Q. Right along side of track 14?

A. Yes, sir.

Q. I ask you whether or not that would bring the engine straight front of him?

A. Yes, sir.

Q. And where were you at that time?

A. In the middle of track 14 just in the center, waiting to ride a car, on track 14.

Q. Do you know where Mr. Ward was at this time?

A. No, sir.

Q. What kind of a signal did Mr. Rogers give to start this train backward?

A. Ordinary signal, a back-up sign.

Q. He gave the ordinary back-up sign?

A. Back-up sign.

Q. When now, was the next time that you saw Mr. Ward? Tell the jury.

95 A. When I saw the feet on the lead when I gave a stop sign.

Mr. Anderson: I ask that the answer be stricken out.

Q. Where was Mr. Ward when you first saw him, whereabouts with reference to the switches—switch- 15 and 16.

A. 16.

Q. Whereabouts was he?

A. At 16 switch.

Q. At switch number 16?

A. Yes, sir.

Q. And do I understand you to say that he was between the tracks?

A. No, he was across the track.

Q. Across the rail?

A. Across the rail, yes, sir.

Q. At the time you first saw him?

A. Yes, sir.

Q. What movement was the train making when you first saw him?

A. Going backwards.

Q. Do you know for what purpose the train was moving backward at that time?

A. To switch those cars in on the different tracks.

Q. Do you know whether or not the kick signal, the so-called signal to kick the cars back, had been given?

A. The had already been given, yes, sir, going back.

Q. And did you see Mr. Rogers give the signal?

A. Yes sir.

96 Q. To kick the cars?

A. Yes, sir.

Q. Is that the signal that you referred to as the moving back signal that was given?

A. The backward signal, yes, sir.

Q. And when you saw Mr. Ward, as you have just told the jury about, what did you do?

A. I gave a stop sign and started toward the engine to make sure that I had given the stop sign right.

Q. What did you do?

A. The ordinary stop sign—washout.

Q. What is that?

A. Washout or stop sign.

Q. How do you move your hands?

A. Very violently when you want them to stop quick and if you want to stop easy, give an easy movement of the hands.

Q. What signal did you give the engineer?

A. Washout.

Q. What do you mean by washout?

A. A very quick sign.

Q. And what did that mean to the engineer?

A. Something wrong.

Q. Was the train stopped pursuant to the signal?

A. It stopped just after I gave the signal.

Q. Where was Mr. Rogers at this time?

A. He was between myself and the spot where Mr. Ward was.

Q. Did you see him give any signal to the engineer?

A. Yes, sir.

97 Q. The stop signal?

A. Yes, sir.

Q. You may state whether or not he gave the signal about the same time as you gave the signal.

A. Yes, sir, about the same time.

Q. Where was Mr. Duffy at this time?

A. Pulling the pin.

Q. Between what cars?

A. 13th and 14th.

Q. Well, in reference to the end car, it would be between the end car and the car next to it?

A. Yes, sir.

Q. Do you know whether or not the pin had been pulled before this stop signal was given?

A. Well, I couldn't tell that. I wouldn't say no or yes to it.

Q. Well, after the cars had stopped, what did you do?

A. I went back down to see what I could do to get him out from under there.

Q. You may state whether or not you took Mr. Ward out.

A. Yes, sir, I helped to do it.

Q. And where was his body in relation to switch number 16?

A. By the 16th switch.

Q. Was he alive at the time you got there?

A. No, sir.

Q. He wasn't?

A. No, sir.

Q. Whereabouts had the cars run over him?

A. Across the center here.

Q. Across his stomach?

98 A. Across his stomach and arms.

Q. How many trucks had passed over him?

A. Two trucks and one pair of wheels.

Q. And where was his body in relation to the trucks under the second car?

A. Right in the center of the truck, under the truck frame.

Q. Now referring to car number 14, the end car, where was that car?

A. The 14th car had left the train.

Q. And had gone down this lead track on the line AB here?

A. Yes, sir.

Q. Do you know about how fast this train was moving before the stop signal was given?

A. Between five and ten miles an hour.

Q. And that was at the time the train was being moved backwards for the purpose of kicking the end car?

A. Yes, sir.

Q. Do you know how fast it is customary to move cars in kicking them on these tracks here at the Hamline yards, the tracks on which these cars were being kicked?

A. I never had any specification as to any speed.

Q. You may state whether or not this train was being moved in any different manner than it was customary to move trains in switching operations of this kind?

A. No, sir.

Q. Was it being moved in any different manner?

99 A. No, sir.

Q. You may state whether or not it was being moved any faster than was customary to move trains for the purpose of switching cars, such as was being done there?

A. No, sir.

Q. What distance did this car number 13 or did this train move after the stop signal had been given?

A. It stopped as quickly as possible.

Q. Do you know about what distance it moved?

A. I couldn't say. I don't suppose much over half a car length or a car length, not any more than that.

Q. You may state whether or not a man standing at switch No. 15 on the lead marked AB was in position so that he could have seen the engineer?

A. No, sir, he couldn't see him.

Q. Why not?

A. Because he would obscure the view, the lead turns off in that direction, turns to the right.

Q. On account of the curve in the track?

A. Yes, sir.

Q. You may state whether or not a person standing along this lead, being the line marked AB here, at any point, could see the engineer when the engine was on track No. 11.

A. No, sir.

Cross-examination.

By Mr. Anderson:

Q. Was there a Mr. Stellick in that crew?

100 A. Being the second day I worked, I couldn't say.

Q. You were working under the name of McDonough?

A. Yes, sir.

Q. You don't know any such person, Stellick?

A. No, sir.

Q. You say the crew was made up of engineer and a fireman of course, that is the engine crew?

A. Yes, sir.

Q. Rogers the foreman?

A. Yes, sir.

Q. And Milander, switch tender?

A. Yes, sir.

Q. And who was the other switch tender?

A. Roy, I believe he said his name was, a little short fellow.

Mr. Jones: He is in the court room here.

Mr. Roy stands up.

Witness: That is him.

Q. And you, Holden and Ward were the field men?

A. Yes, sir.

Q. And what other man was there in the crew?

A. Duffy.

Q. And what other man?

A. You have his name, Rogers.

Q. That was the foreman. Anybody else?

A. No, sir. Mr. Ward.

Q. Well, I mentioned him. Oh, Stellick was the fireman. Now as this train pulled off track 14, it went east?

A. Yes, sir.

101 Q. The engine was headed away from the train?

A. Yes, sir.

A. And it pulled up on what counsel speaks of as track 11. But you said you didn't know it by that name?

A. I didn't know it, no, sir.

Q. Well, you speak of it as the lead track?

A. The lead track.

Q. But there were no tracks running off from 11 beyond the line marked on this Exhibit as CD, was there?

A. There was no track running off from 11, no. 14 was the first switch.

Q. Then the line that has been spoken of in this plat, Defendant's Exhibit 3, as AB, was a track really, if I understand it correctly, connected with track 11 or what you called the extension or lead, the same as any other track would be connected by a switch, wasn't it?

A. Yes, sir.

Q. In other words what is on this plat Exhibit 3 as track 11 and track 14 was one straight track?

A. Yes, sir.

Q. And what is spoken of here as the lead AB simply turned off from that somewhat the same as a side track would?

A. Yes, sir.

Q. That is, there was some little curve up here at the point where we speak of as switch 14, is that right?

A. There is no curve in the 14 track.

Q. What I mean is, that in coming in on what has been spoken of as track 11 and backing in down on what has been spoken of as the lead AB, as the train backed up it would have to go over and switch and turn a little to the right and in backing up, wouldn't it?

A. Yes, it would, yes, sir.

Q. Of course this Exhibit 3, unless it is explained, doesn't look at all like those tracks does it, with these sharp turns that we have here? You come on track 11 and turn a sharp angle and go off on AB.

A. That is the way the track there—it is 14 that turns off, 14 and 15.

Q. The lead AB doesn't turn off from tracks 11 and 14 in that sharp manner, does it?

A. The same as any other track.

Q. Is that an ordinary turn?

A. No, sir, it isn't an ordinary turn.

Q. You don't run trains around a right-angle corner or a 30 degree corner do you?

A. No, sir.

Q. As a matter of fact, as you stand on track 11 and look west so that you would be looking down the lead AB, it is almost like looking down a straight track isn't it—just a little turn to the right to come down on AB from 11?

A. Down and turn off to the right.

Q. You don't turn off a sharp turn do you?

A. The 15th switch—

Q. Never mind the 15th switch. You mean by that that you can stand up close to a train when it is going off from one track to another and see up to the engine if you are on the passing-track?

A. That is what I mean.

103 Q. But I want to have the jury understand the situation. Perhaps we can get at it in this way. Just about what angle does this track AB, this lead, come up to track 11 and 14 and meet it?

A. The only way I can explain it, the tracks are put over five feet, across the track, a space of five feet between them; that is the difference in the tracks. I don't know any different than that.

Q. Here is 11. Take this shelf, board or whatever you call it, in front of the jurymen, you are coming on 11 and backing up, you understand?

A. Yes.

Q. Now you come to switch 14, that has to be lined up for the lead track AB doesn't it?

A. Yes.

Q. As you come along there, the switch being lined up, instead of going right on down track 14, the rear car takes the switch and goes across doesn't it?

A. Yes.

Q. Now then, there is a frog there somewhere isn't there?

A. Yes, sir.

Q. In fact wherever you find a switch there in the Hamline yards running off from the lead or any other track, there is always a frog, isn't there?

A. Yes, sir.

Q. Now you have spoken about distances here. I would like to have you tell this jury did you ever see a switch track in the Hamline yards where the point of the switch was so close as 50 feet to the frog of that track?

A. 50 feet to the point of the track?

104 Q. From the frog to the point of the switch.

A. A car length, yes. From the point of the switch to the frog it is about a car length.

Q. To the frog?

A. Yes, sir.

Q. Isn't it nearer two car lengths?

A. No, sir.

Q. Stop to think. Say that switch here, the point of the switch, is at that wall, wouldn't you find the frog itself at least as far as the wall at the other end of this room?

A. That is where the two tracks joined from the lead going on to 15 or 16.

Q. You know what a frog is?

A. Yes, sir, I know what a frog is. The point of a switch and a frog is different.

Q. The point of the switch is where you begin to go in on this track, you begin to run on—

A. Yes.

Q. And the point of switch 14 turns around to the east doesn't it?

A. Yes, sir.

Q. In other words, coming back there, you would run against the point of the switch?

A. Yes.

Q. Now then after you run over the switch and run down some little distance, your wheels begin to pass over the track that I am speaking of—11 or this extension, some little distance away from the point of the switch don't you, before you begin to run over the track that you are leaving, the rails?

05 A. It isn't over a car length, if it is a car length, the frog on 14.

Q. How far is it from the frog of switch 14 to the frog of switch 15.

A. It might be a little more than a car length.

Q. How far is it from the frog of switch 14 to the switch points switch 15?

A. I just couldn't specify the feet but it is longer than a car length.

Q. It is a good deal longer than a car length isn't it?

A. Yes.

Q. When you have a switch like this off this lead track AB—when I say switches, the switch stands are always opposite the switch points aren't they?

A. Yes, sir.

Q. When you go from one switch stand—say switch stand 15 to switch stand 16—don't you have to go at least 150 to 175 feet?

A. Oh no, no, sir.

Q. You have to go by the frog before you come to the next switch point, don't you?

A. No, you don't need to. The frog is on the left side of the lead.

Q. The frogs are on the side where the tracks lead off, aren't they?

A. Yes, sir.

Q. For instance when you are coming down this lead AB, as you were backing at that time, there are two rails, of course, for the wheels to run on; that is right, isn't it?

A. Yes, sir.

106 Q. There are no frogs on the right hand rail, are there?

A. No, sir, they are all points.

Q. You come to the switch point and your wheel on the right hand side of your car cuts diagonally across that lead track doesn't it, between the two rails, isn't that right?

A. Yes.

Q. And after awhile, the wheels come to a point where they have got to cross the left hand track, the left hand rail?

A. Yes.

Q. That is the frog isn't it?

A. Yes.

Q. Now the frog is about midway between the two switches isn't it?

A. About maybe that.

Q. And when you said that switches 15 and 16 were 50 feet apart, you are mistaken, aren't you?

A. I mean the switch stands are about thirty feet apart.

Q. About 50 feet?

A. Yes.

Q. Then how far is the frog from each switch stand?

A. They are in between them.

Mr. Anderson: Within about 20 feet of the switch stand.

The Court: Does that lead lead off in a northwestern direction?

Mr. Anderson: Yes.

The Court: The main track on which the operation was started was south of this track?

107 Mr. Anderson: Well it would be south,—14?

The Court: Yes.

Mr. Anderson: It would be south of the other track.

The Court: They were backing in towards the west.

Mr. Anderson: They were backing in towards the west and turning off somewhat to the north.

Mr. Janes: 14 is south of switch 15.

Q. There was nothing peculiar or different about the curve, when you were passing over switch 14 on to the lead than there would be in passing over a switch off from the lead on to any of these side tracks, was there?

A. No, sir, not any difference.

Q. In other words, the curve was nothing more than was necessary in order to have the switches and connect with the frog and then gradually work out until you get beyond the track that you were running off from; isn't that right?

A. Yes, sir.

Q. And when that was all done and as the train was partly on one and partly on the other, coming around the switch, there is a sort of a slight curve in the train isn't there?

A. Yes, sir.

Q. And when you are in such a position as that, and a man is on the ground whose duty it is to give signals to the engineer, and you have been in the habit of conveying the signals, the foreman stands out from the train far enough so he can see the engineer, doesn't he?

A. Yes, sir.

108 Q. And on such a curve as we have on track 14, and going on to the lead as you were this time, with the foreman standing at or near 15 switch, he would not have to get out over 15 or 20 feet from the track to see the engineer, or to have the engineer see him, would he?

A. He wasn't at 15, he was between 14——

Q. We have several men to tell stories here, you don't agree.

A. All right, sir.

Q. Assuming he is down at or near track 15, as counsel asked you, and was back 15 or 20 feet from the track, he then could see the engineer, couldn't he, back as far as I am from that wall, something like this?

Mr. Janes: Let's see if the witness understands the question.

Witness: Do you mean if he was on the straight track or 14, that he could see him, that he could see the engineer?

Q. You are backing down there at this time, aren't you?

A. Yes, sir.

Q. You are backing off what counsel speaks of as track 11, over switch 14?

A. Yes.

Q. And this train comes over switch 14?

A. Yes, sir.

Q. One car, two or three cars, I don't care which. And the foreman Rogers, we put him opposite or about opposite switch 15. Do you understand?

A. Yes, sir, I have got you.

109 Q. Now let that represent this lead track AB; do you understand it?

A. Yes, sir.

Q. And the engine is coming from there and coming down on this lead?

A. Yes, sir.

Q. And switch 15 is on that lead track isn't it?

A. Yes, sir.

Q. Now say that Rogers was standing opposite that switch 15, back from the track, about as I am from the wall, could he then see the engineer up here?

A. No, sir.

Q. How far back would he get?

A. Have to get over 14 track, between 14 and 13.

Q. If you back away from switch 15, you don't go anywheres near 14 track, do you?

A. Yes, sir, you do, if you back over to it, yes.

Q. If you go right back from the lead track?

A. Yes, sir.

Q. And follow—what is that track called leading off from switch 15—it is 15 track isn't it?

A. 15 is off the lead, the track was originally called the lead.

Q. There is the track that leads off from switch 15?

A. No, sir, 15 is on the lead. That is the lead, and here is 14. If he stood opposite 15, he couldn't see the engineer on a straight track.

Q. Where is track 15?

A. Track 15 is here (indicating).

Q. CD. Here is AB over here.

110 A. Here is 14 you are pulling off. Here is 15. If Rogers was in here—

Q. This track 15—is this the track?

A. Yes.

Q. That is what I said, it parallels 14, doesn't it? Does track 15 parallel track 14?

A. Yes, sir.

Q. That is what I want to know. Now then I will make it clear. Keep Rogers on track 15 now, will you? And let him back away from 15 switch right along 15. 14 is over here to his right, isn't it?

A. Yes, sir.

Q. How far would he have to back out here to see the engineer as he came along over switch 14 and on this lead track AB?

A. Have to cross 14 track.

Q. He is not going that way at all?

A. Yes, he is.

Q. I am not putting him that way. Track 14 is over to the left. How far out from the lead track on track 15 would he have to come to see that engineer?

A. One track—14.

Q. You are bound to have him going to the right are you?

A. He had to go towards the engine. He would take too long to get there the other way.

The Court here adjourned until Thursday morning, January 15th at ten o'clock A. M.

Q. I have forgotten just where you were as the train was backing down towards the scene of the accident. Where were you?

A. 14.

111 Q. Where had you come from to get to 14?

A. Rode the hind end of the cut out.

Q. Went on this train when it came back down from where it pulled up and stopped and then came back?

A. No, sir, I got off when I went up.

Q. That is what I thought. How far away from the foreman were you?

A. Probably ten to fifteen feet.

Q. I think you have testified in the direct examination that Mr. Ward was dead when you got to him?

A. Yes, sir.

Q. What motions if any was he making?

A. Nothing at all.

Q. Are you sure of that?

A. Positive.

Q. Did you help him out from under the cars?

A. Yes, sir.

Q. He was not groaning or anything that you could notice?

A. No, sir.

Q. Where did you come from to come up on this trial?

A. Kansas City.

Q. What are you doing now?

A. Switching cars.

Q. For whom?

A. The Burlington.

Q. For the Burlington road?

A. Yes, sir.

Q. How long have you been down to Kansas City?

112 A. About a week.

Q. Where were you before that?

A. On the Coast.

Q. What were you doing out there?

A. Switching cars.

Q. When did you quit the Great Northern service?

A. The 7th of January, a year ago, 1913.

Q. Discharged or resigned?

A. Resigned.

Q. Where did you go then?

A. Cedar Rapids.

Q. Have you ever worked for the Great Northern since the time you resigned?

A. No, sir.

Q. You entered the employ of the Burlington when?

A. A week ago Monday.

Q. Are you planning to come back up to the Great Northern?

A. No, sir.

Q. Are you a married man?

A. No, sir.

Q. Did you make a statement as to this accident that day? make out the usual report, 245?

A. I made a statement that evening in the office there. I don't know who the gentleman was. I made a statement out in the office.

Q. Did you fill out the regular blank form?

A. I think Mr. Rogers had a 295 or 245. I think I made that out and signed it, I am not positive about it.

Q. When was it that you began to talk about the facts in
113 this case after you made out your report that day or evening?

When did you commence to talk about it to anybody?

A. I didn't hear anything about it afterwards at all.

Q. Not until after you were sent for?

A. No, I heard of it in Texas.

Q. How long ago?

A. In April or May, I am not positive.

Q. You mean by mail, you heard of it by letter?

A. Yes, by mail.

Q. Then you never discussed the facts in this case?

A. No, sir.

Q. At all, with anybody until you came up here now within the
last few days?

A. No, sir.

Q. And of course you have talked this over with the attorney
and the claim agent?

A. No, sir, I haven't been with nobody.

Q. Never said anything to anybody until they put you on the
stand?

A. I came right up here; I was about ten minutes——

Q. You talked with somebody?

A. I went down there and reported.

Q. Didn't you go over the case with them to see what you knew
about it?

A. They asked me if I was there and I told them yes, and I came
here.

Q. You wish to be understood that you remember all this matter,
just where you were, the spot of the train, the conversation
114 and everything that took place there——

A. There was no conversation.

Q. Without discussing it at any time since the accident?

Objected to as assuming something that the witness has not testi-
fied about. He has not testified to any conversation.

Witness: There was no conversation at all.

Q. You remember accurately about the speed of the train at the
present time do you?

A. I judge five to ten miles an hour.

Q. It might have been running ten, so far as you know?

A. Might have been running ten so far as I know.

Q. It might have been running 11.

A. Not any more than ten, I wouldn't judge of the speed; it might have been.

Q. What is it that fixes it so accurately in your mind that the train stopped not to exceed a car length or half a car length, I think you said, beyond switch 14? How do you happen to remember that so accurately now?

A. Because the man that pulls the pins follows those cars. They are marked with chalk and he has no instructions, no car signals; he gets them with the chalk mark, and we wait for them to come down. The instructions I had from Rogers during that time were that nobody is to ride empty cars on a cold day, they wouldn't run—

Q. You are giving this last answer as your reason for remembering just where the train stopped, are you?

115 A. Yes, sir.

Q. What did the chalking of the cars have to do with helping you to remember just where the train stopped?

A. I know it was the last car on the track. Owing to it being an empty, it wasn't supposed to be ridden.

Q. Do you find in your experience out there while working in the Hamline yard that you remember just where every train stopped when you were switching so as to tell the exact distance from switches where it stopped?

A. In that case, yes.

Q. Why in this case?

A. Because the switch had to be thrown to back down this lead.

Q. Switch 14?

A. Yes, sir.

Q. You would throw it?

A. No. Generally if we were there, we would throw the switch and drop this cut. We generally throwed any cars, if we were there, and ride with the car. If he was on the ground he threw the switch, if he was near to it.

Q. And that is the reason for saying that the car stopped within half a car length.

A. In my experience, usually, what I have done, pull over the switch to give the car further good time—ample room to kick the car.

Q. That is your experience?

A. Yes.

116 Q. I am asking you about this individual car. You say it went a car length. It didn't go a bit farther?

A. It may have went an inch. It went a car length anyway.

Q. Not twelve inches?

A. I don't know anything about it. I am say- you a car length.

Q. Not a car length and a half?

A. I don't know anything about it. I am saying about a car length.

Q. It didn't go two car lengths?

A. I couldn't say. I am telling you one car length, is my estimation.

Q. It didn't go five car lengths?

A. No, it didn't go five car lengths, it went one car length.

Q. How far back had the train moved, in your judgment, before the accident occurred?

A. It was about four car lengths and it went one car length after the accident occurred, after he was on the ground holling, and it stopped when he was under the first pair of wheels, on the second car.

Q. Your estimation is four car lengths that the train moved when the accident occurred?

A. Yes, from the time I saw the legs rolling on the ground.

Q. You saw him under the first car—

A. Rolling under the first car until he came to the second car.

Q. You didn't see him go off?

A. No, sir.

117 Q. Which way were you looking as the train backed along instantly before you saw him under the car?

A. Looking for the numbers on the cars previous to that to see what car to ride and see what track they were going on.

Q. You were going to see which car you were going to ride?

A. Yes, sir.

Q. Were you going to ride them then?

A. No, Mr. Ward—The first car was an empty, it wasn't supposed to be ridden at all. The next car was a load and I would take the next loaded car.

Q. Were you going to ride the car yourself on that movement?

A. Waiting for it.

Q. Going to get right on then?

A. No, sir.

Q. When were you going to get on your car to ride it?

A. When a load came to me.

Q. I mean as it came along there, were you going to get right on on that movement?

A. It would either stop and start to kick again because the position of the car wouldn't let them go at that time.

Q. You were going to make the kick of this car?

A. It would stop and start to kick another car to go to another track.

Q. The purpose and design you had was to kick this car and stop before the rear of the train would be over the switch
118 that your car was to go over, is that it, or the next car?

A. The next car, yes, sir.

Q. You weren't going to ride the next car?

A. No, sir.

Q. You were going to wait until that was kicked off and then you were going to ride one?

A. Going to ride the first load that came to me.

Q. What track was the next car going to be kicked in on, the one that you say Mr. Ward was to ride?

A. I don't know, I never took any notice to it.

- Q. Which track was your car to go in on?
 A. I don't know. I didn't know until the time the cars pulled out. I took any car that came to us on our turn.
- Q. Which car was Holden going to ride?
 A. Holden was going to ride the car that they cut off.
- Q. Which one was he going to ride? You said nobody was to ride that car.
 A. He had no business getting on that car. In the first place, he had no business getting on the car.
- Q. He had no business to get on that car?
 A. No, sir.
- Q. The proper thing was to let that car go?
 A. The proper thing was to let it go.
- Q. Even if it would strike empty cars, that don't make any difference?
 A. Rogers would have to answer for that.
- Q. It don't make any difference if it would strike empty cars or not?
 119 A. It don't make any difference if it would strike empty cars, no.
- Q. Do you happen to know how far that car did go on this kick?
 A. No, I didn't pay any attention to the car.
- Q. Do I understand that you don't ride empty cars at all?
 A. On a clear track, yes.
- Q. You do ride them on a clear track?
 A. We ride them on a clear track, put a brake on them and stop them so they wouldn't go through the block track where there is cars in it.
- Q. Don't you ride them?
 A. No, sir.
- Q. You let them slam in?
 A. Let them slam in.
- Q. When there is nothing to slam into, you ride them?
 A. When there is nothing to slam into, we ride them.

Redirect examination.

By Mr. Janes:

Q. Do I understand, in answer to Mr. Anderson's questions that the reason that you were not riding this empty car in, that no one was to ride that empty car in, was because you had received instructions from the foreman that morning not none of us rode any empty cars.

A. He told the whole crew it wasn't necessary to ride empty cars, it was too cold and they wouldn't run and it wasn't necessary to ride them. In fact none of us rode any empty cars.

120 Q. I believe that you said you heard from the Great Northern Railroad Company while you were in Texas. Was that a letter that you received from Mr. Kimball, the general claim agent?

A. Yes, sir, I think it was Mr. Kimball.

Q. Asking you to report at the trial of this case?

A. No, he told me to keep in the—

Q. Keep him advised as to where you were?

A. Where I was going, where I was working.

Q. And you have done so?

A. No, sir, I left town.

Q. You kept Mr. Kimball advised?

A. They had my home address and that is how they got me.

Q. And when this train came up from track 14 and went on to track 11, it simply passed far enough over switch 14, as I understand it, so as to give them a chance to throw switch 14?

A. That is the idea.

Q. Was there any reason for this train to go farther down track No. 11 than to just clear switch 14?

A. No, sir.

Q. Looking at Exhibit 4, will you state whether or not Exhibit 4 is a plat of the tracks in question here, track No. 14 and track No. 11 and the lead track running off to the northwest from it, with the switches numbered 15, 16, 17 and 18 on that plat and also switch No. 14?

A. This is the 14th track here and 14 switch in here.

Q. This is a plat showing the location of track No. 14 121 and track No. 11 and the lead running off to the northwest?

A. Yes, sir.

Q. This line in red marked 14, is that the track 14 that has been referred to here?

A. Yes, sir.

Q. Marking the plat with a figure 14 above the white mark, is that switch No. 14?

A. Yes, sir.

Q. And then beginning at the No. 14 or switch 14 and running in a northwesterly direction along the yellow line, the white mark on this plat with a light line drawn through them, represents switches, do they not?

A. Yes.

Q. They are numbered consecutively beginning at 14 along this yellow line here, where I place the figures 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24?

A. Yes, sir.

Q. And the track No. 11 that we have referred to, is the track that lies directly east of switch No. 14 and this is a continuance of track No. 14?

A. Yes, sir.

Q. And track No. 11 being the continuance of the red line?

A. Yes, sir.

Defendant's Exhibit 4 offered in evidence, for the purpose of showing the location of these switches and the tracks in question, the scale of map being one inch to the hundred feet.

ANDREW DUFFY, sworn on behalf of defendant, testified:

122 By Mr. Janes:

Q. Mr. Duffy, where do you live?

A. 203 Lyndale avenue North, Minneapolis.

Q. And for whom are you working at the present time?

A. Great Northern.

Q. You were working for the Great Northern Railroad Company on December 13, 1912?

A. Yes, sir.

Q. And were you working in the yards and with Mr. Ward at the time he was killed?

A. Yes, sir.

Q. And what time of day was it when this accident occurred?

A. About 10:30.

Q. How long have you worked for the Great Northern Railroad Company?

A. A little over a year.

Q. And what work were you doing at the time that Mr. Ward was killed?

A. I was supposed to be pin-puller.

Q. You were the pin-puller for this crew?

A. Yes, sir.

Q. And I believe that Mr. Rogers was foreman of the crew?

A. Yes, sir.

Q. And in pulling the pins in this train on the morning in question, how did you know what pins to pull, what cars to cut off?

A. The cars were all marked by chalk.

Q. Did you on that morning receive any signals as to what cars should be cut off?

A. No, sir.

23 Q. As I understand it, you knew what cars to cut off from the chalk-marks that appeared on the cars?

A. Yes, sir.

Q. What would appear upon the car? How would you know what car to cut off?

A. By the number of the car.

Q. What would that number mean?

A. It would mean the track it was to go on to.

Q. That is, if you were going to put this car on to track No. 18, there would be a figure 18 on the car?

A. Yes, sir.

Q. You may state whether or not this car that was cut off, that has been referred to here in the testimony, was marked in that manner.

A. Yes, sir.

Q. Do you know what track this car was to be placed on?

A. 22.

The Court: Which car do you refer to?

Mr. Janes: The end car, the car that was cut off there.

Witness: 22.

Q. Now, looking at Defendant's Exhibit 4, being a plat of the yard, is the red line upon this plat, and does it indicate track No. 14 that has been referred to here in this testimony and also track No. 11?

A. Yes, sir.

Mr. Anderson: I think that may as well be conceded. I don't doubt that the plan is correct.

Q. Noticing the figure 14 on this plat, which is 124 there for the purpose of indicating the 14th switch, and figure No. 15, indicating the 15th switch, and figure No. 16, the 16th switch—

A. Yes, sir.

Q. —where was this train just before it pulled up by the 14th switch?

A. 14 track.

Q. And which way was the engine headed?

A. East.

Q. And do you know for what purpose this train pulled beyond the 14th switch?

A. Yes, sir.

Q. For what purpose?

A. To get over 14 switch.

Q. And then what, after getting over the 14th switch, were they going to do?

A. Back down on to the lead.

Q. And the lead here is indicated by this yellow line on the plat?

A. Yes, sir.

Q. And how far did the end car of this train go beyond the 14th switch?

A. I couldn't say.

Q. Do you know about how far?

A. No, I couldn't say.

Q. When this train ran down the track No. 14 and beyond the 14th switch, where was Mr. Rogers?

A. He was between 14 track and 13 track, close between 14 and 15 switch.

Q. Where is the 13th track?

A. This one right here (indicating).

Q. Indicating on the plat with the figure 13 immediately below 14 and parallel with 14?

125 A. Yes, sir.

Q. And that would be south of track 14?

A. Yes, sir.

Q. You said that he was between switches 14 and 15; and what do you mean by that?

A. He was between those two switches and between 13 and 14 track.

Q. And where were you at that time?

A. I couldn't state where I was.

Q. Did you make the cut off of this end car? did you cut the end car off?

A. Yes, sir.

Q. And do you know what kind of a car that was?

A. It was an N. P. empty.

Q. And where were you at the time that you made the cut of this car?

A. Between the hind car and the second hind car.

Q. And in reference to the switches on this plat, 14, 15 and 16, where were you at the time you made the cut?

A. Close to 15 switch.

Q. And where was Mr. Rogers at the time that you made the cut?

A. I couldn't tell you. My back was turned towards him.

Q. Either at the time that you made the cut or just before you made the cut, where was Holden?

A. Holden was getting on the car.

Q. You may state whether or not Holden got on to the end car before the cut was made?

126 A. Yes, sir; he came near throwing me under the car himself.

Q. And that was before the cut was made?

A. Yes, sir.

Q. What do you mean by he came near throwing you under the car himself?

A. I was running alongside of the car and he got on and got in my way and came near tripping me up.

Q. Do you know where Mr. Ward was at this time?

A. No, sir.

Q. Where was Ward the last time you had seen him, before you made the cut?

A. I never seen him before that.

Q. What movement was this train making at the time you made the cut?

A. Backward.

Q. And for what purpose were they moving backward at that time?

A. Making a kick.

Q. Kicking this end car, the Northern Pacific car that you have referred to?

A. Yes, sir.

Q. How long have you been a switchman?

A. About a year.

Q. Have you done any railroading, before that?

A. Yes, sir.

Q. What was your work?

A. Brakeman.

Q. How long were you brakeman?

A. About a year.

127 Mr. Anderson: What does he mean—he switched a year before this accident?

Mr. Janes: He had been a switchman for a year——

Mr. Anderson: Up to the time of the accident?

Mr. Janes: Yes.

Q. Do I understand your answer that way?

A. Yes. Well, I have been switching for the Great Northern a year and a little over up to this time.

Q. Up to the present time?

A. Yes, sir.

Q. How long had you been switching at the time that Mr. Ward was killed?

A. About two months.

Q. Had you ever done any switching before that?

A. Not to amount to anything.

Q. How long had you been braking before that?

A. For a year.

Q. For what road?

A. The Illinois Central.

Q. At the time that you made the cut on these cars that you have just told the jury about, how fast was this train moving?

A. From five to nine or ten miles an hour. It is pretty hard for me to tell on account of my having both hands occupied at the same time.

Q. Do you know about how fast it is customary and usual to move cars in an operation similar to this kicking operation that was being made at that time?

A. Yes, sir.

128 Q. Will you tell the jury whether or not these cars were being moved any faster at that time than it was usual and customary to move cars in a similar operation.

A. No, they weren't.

Q. After you had cut the car, did you notice or see Mr. Ward, after you had made the cut of the car?

A. Not until I seen him underneath the car.

Q. That was the first time that you saw him?

A. Yes, sir.

Q. And where was he at that time when you first saw him?

A. Under the car.

Q. What car was he under when you first saw him? In reference to the N. P. car, what car was he under?

A. The next one to it.

Q. And I presume that the train was stopped after you had seen how he—

A. It was stopped, yes.

Q. And how many cars had passed over Mr. Ward, if you know?

A. After I seen him?

Q. No, after the train stopped?

A. One car and one pair of wheels.

Q. Where was Ward in reference to the third car of this train?

A. After the accident?

Q. Yes, where was his body?

A. Which third car do you mean?

Q. Counting the N. P. car as the first car, under what trucks of the third car?

129 A. The hind trucks of the third car.

Mr. Anderson: What is the first car?

Mr. Janes: The N. P. car.

Mr. Anderson: What is the first car?

Mr. Janes: The one that had been cut off.

Q. And then the two trucks of the second car had passed over him?

A. Yes, sir.

Q. And the first wheels of the third car had passed over his body?

A. Yes, sir.

Q. Did you assist in taking him out from under this car?

A. Yes, sir.

Q. Who else was there?

A. Well, Mr. Rogers and the man that was just on the stand, and the fireman on another engine.

Q. Is the fireman that was on the other engine in the court-room?

A. Yes, sir.

Q. At the time you got to him, and when you took him out, will you tell the jury whether or not he was alive or dead at that time?

A. I think he was dead. I didn't pay much attention to it. I think he was breathing a little when he was taken out from underneath the car.

Q. Just before you saw Mr. Ward under the car, that you have told the jury about, or after you had made this cut, did you see any signals given?

A. No, sir.

Q. You then don't know who gave the signal to stop the train?

130 A. No, sir.

Q. When a cut has been made do you give any signal to the foreman to indicate that you have made the cut?

A. No, sir.

Q. Is it customary so to do?

A. No, sir.

Q. In relation to switch No. 16 where was Mr. Ward's body?

A. Well, it was close to it.

Q. Well, what do you mean by close to it?

A. Within two or three feet of it, right by it.

Q. Within two or three feet of it?

A. Or right by it. I didn't pay no attention to where the switch was at all at the time.

Q. You spoke about Holden getting on to the N. P. car. Did he come between you and the train and the cars when he was getting on to this car?

A. He came between me.

Q. Yes, and the car?

A. He got right in front of me.

Q. Where was the ladder on this N. P. car in relation to the coupler, the coupling-pin that you were pulling at the time?

A. It was on the same end.

The Court: Let me ask: were these men working on the southerly side of this string of cars?

Mr. Anderson: South side.

Q. They were working on the engineer's side.

A. Yes, sir.

Q. And that would be on the south side of the train?

181 A. Yes.

Q. As I understand it, the signals are given always to the engineer on the engineer's side?

A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. Were you standing or moving before you started for this car to uncouple?

A. I didn't understand your question.

Q. Were you standing still before you started towards this car to uncouple it?

No answer.

Q. What I want to get at, so as to locate you, were you standing there waiting for your time to come to uncouple that car, or were you coming up from somewhere?

A. I was standing there waiting.

Q. Locate yourself as to where you were before you started towards this car.

A. I couldn't locate myself.

Q. Well, you can tell us something about it, you ought to have some idea. In the first place, you were on that side of the engine, weren't you?

A. Yes, sir.

Q. And you were not very far from Mr. Rogers, the foreman, were you?

A. Well, I don't think I would be——

Q. Well, were you? You know. You saw Mr. Rogers before this train came back and the time came for you to uncouple, didn't you?

A. Not at the time to uncouple, no.

182 Q. But before that, you saw him some time before that, didn't you?

A. Yes, sir.

Q. You saw him a moment before, didn't you, standing there within ten or fifteen feet of you, wasn't he?

A. Yes, I guess he was there.

Q. And when you started to cross, when you started to uncouple the car, you went towards the train, didn't you, just as though the train was running along there and you started to cross to get this car?

A. I might have been standing right at the car just at the time.

Q. You couldn't be standing at the car, it was moving, wasn't it? You mean close up to the car as it passed you?

A. Yes, sir.

Q. But you don't know how close to you, is that the idea?

A. No, sir.

Q. Can you give us some idea as to where you were with reference to some of the switches when you reached the pin-lifter on that car?

A. 14.

Q. About 14?

A. I might have been the one that threw the 14th switch.

Q. You took hold of the pin-lifter?

A. Yes, sir.

Q. As soon as you got that car you took ahold of the pin-lifter?

A. Yes, sir.

133 Q. The right side would be towards the train as you ran alongside of it?

A. Yes, sir.

Q. Then you had hold of the pin-lifter with your right hand?

A. Yes, sir.

Q. What were you doing with your left hand?

A. I had hold of the grab-iron.

Q. On the end of the car?

A. On the side of the car?

Q. You had hold of one of the grab-irons of the ladder, then?

A. Yes, sir.

Q. But there was a grab-iron on the end of the car?

A. Yes, sir.

Q. You have already located Rogers, you said Rogers was between 13 and 14 track?

A. Between 13 and 14 track.

Q. Yes, and between 14 and 15 switch?

A. Yes, sir.

Q. By that you mean if 13 track was running along here and 14 track along here—

A. He would be in the middle of it.

Q. He would be in that space, and the 14th and 15th switch would be over opposite him?

A. Yes, sir.

Q. And he would be somewhere between these two spaces. And it is your best and honest judgment that you were pretty close to Rogers before you started over is that right?

A. Yes, sir.

Q. And when you started over to get ahold of the pin-lifter, you took a direct line for the car, didn't you, even though it was one step or half a dozen steps, you went right towards the car, didn't you?

A. Yes, sir.

Q. And then you ran along with the train?

A. Yes, sir.

Q. You pulled the pin as quick as you could when you got there, didn't you?

A. Yes, sir.

Q. And the pulling of the pin is a motion like that (illustrating) and up, isn't it?

A. Yes, sir.

Q. And it is the foreman's business to stop the train; he gave the signals, didn't he?

A. Yes, sir.

Q. And he would be watching you, in the ordinary course of the work, wouldn't he?

A. Not necessarily, no.

Q. How would he know when you got the pin?

A. I am supposed to get it whether he knows it or not.

Q. How would the man know that you were at the pin unless he was looking at you and watching you?

A. I am supposed to be there.

Q. I want to know whether you conduct work out there by guess-work or whether you do it by eyesight and signs or what. Doesn't Rogers watch you when you are pulling pins so as to know when you get the pin, ordinarily?

A. He can't see me getting the pin.

135 Q. He can't see you getting the pin in broad daylight?

A. No, sir, not unless I am right opposite him.

Q. Why can't he see when you get the pin?

A. Because of the obstruction of the cars. He can't see around the corners of the cars.

Q. Oh, were you turning around the corner when you were pulling the pin at that time?

A. No, sir, I wasn't.

Q. He was on the same side when you were pulling the pin?

A. There was a space of only about two feet.

Q. You didn't go in between the cars to pull the pin?

A. Well, my right shoulder is in between them.

Q. Why do you get your right shoulder in between the cars; to pull the pin?

A. Because I can't pull it in any other way very well unless I hang on to the car.

Q. Now, Mr. Duffy, just take the end of this as the corner of the car, will you?

A. Yes, sir.

Q. And let this represent the car, the Northern Pacific empty, as you call it?

A. Yes, sir.

Q. The ladder is right here, isn't it, going up this corner?

A. Yes, sir.

Q. The pin-lifter is right here on the end with the pin-handle coming right down, the lifter running in and fastened to—

A. Some of them isn't the same distance of the car as the

136 others.

Q. Did you ever see one more than eight inches in?

A. Well, I think I did, yes.

Q. Yes, but nine times out of ten they would be within two or six inches of the corner, wouldn't they?

A. No, sir. Well, yes, six.

Q. Two to six inches, some are closer than six inches?

A. Yes.

Q. You don't happen to know how close they have to be, do you?

A. No, I don't just exactly.

Q. And in lifting that pin you come along here and take hold of the grab-iron and steady yourself—

A. Yes, sir.

Q. Well, you do that especially when the train is running fast?

A. At any time.

Q. And this train was running faster than usual, wasn't it?

A. No, sir.

Q. You have made a statement, have you not, in writing, signed a statement in writing that you had to run faster this time than usual, haven't you?

A. Not any ordinary switching of an empty car, no.

Q. At any rate, all you had to do was to stop up there, take hold of that pin-lifter and lift it up and the cars were uncoupled, weren't they?

137 A. I had to hold it up and run alongside of the car, yes, sir.

Q. What did you have to hold it up for?

A. To make the uncoupling.

Q. Doesn't the pin come up the minute you lift that pin-lifter?

A. Yes, and you have to hold it there.

Q. You have to hold it there until when?

A. Until the car uncouples.

Q. What uncouples the car after the pin is pulled?

A. The stop of the train.

Q. That is it. Then you mean you would hold it up until the foreman gives the stop signal?

A. Yes, sir.

Q. And it is the moment the car starts you lift that pin, unless you are going to ride the car?

A. Yes, sir.

Q. And if the foreman gives the stop signal before you get the pin, you won't get it uncoupled, will you?

A. No, sir.

Q. Because you can't uncouple after the slack is pulled out, can you?

A. No, sir.

Q. Now, if Rogers was over here and the train was coming along by him and he is looking at all, can't he see the motion of your arms?

A. Some pins you pull up too far and they won't uncouple anyhow.

Q. I don't see how that answers as to the eyesight of Mr. Rogers. Why can't he tell?

138 A. Some pins you can pull clear up, too far up and they won't uncouple.

Q. He can see you do it, can't he?

A. Yes.

Q. I am not quibbling with you. Rogers couldn't see the pin, could he?

A. No, sir.

Q. He doesn't have to see the pin to know when you make the motion to uncouple, does he?

A. No, sir.

Q. And as soon as you make the motion to uncouple, he gives the stop signal, or before, lots of times; isn't that right?

A. I didn't understand your question.

Q. He gives the stop signal as soon as you pull the pin, at any rate, ordinarily, doesn't he?

A. I always pull the pin pretty near right after the car starts to move.

Q. What?

A. I pull the pin right after the car starts to move.

Q. Did you this time?

A. And they go just as fast as they like with it.

Q. Did you this time?

A. Yes.

Q. How far did you move with the train before the cars separated from the rest of the train, with your hand on the pin-lifter and the other hand on the grab-iron?

A. I couldn't state the distance.

Q. Well, did you move a carlength?

A. Yes, I moved a carlength.

Q. Did you move more?

139 A. I couldn't say.

Q. Well, you moved with the car some after it separated, didn't you?

A. A step or two, yes, sir.

Q. In order to get your balance; is that right? You couldn't stop instantly, could you?

A. No, sir.

Q. I would like to ask you to think a little bit and then answer this question: Wasn't this train running faster than usual in the switching movement or switching operation at that time?

A. Well, sir, I couldn't state whether it was or not because Holden bothered me so that I couldn't pay any attention to the rate of the train. He was in my way and I had to look out for myself. He came near tripping me as it was.

Q. Are you friendly to Holden?

A. Well—

Q. Not very, are you?

A. Not any more than I am to anybody else.

Q. You are not a friend of Holden's at all, are you?

A. I don't know what you mean.

Q. You don't know what that word means?

A. Personal friend?

Q. Yes.

- A. No, sir.
- Q. Do you feel friendly towards him?
- A. No, sir, I don't feel either one way or the other.
- Q. Do you speak when you meet?
- A. Yes, sir.
- Q. Now, if I remember correctly—I don't want to quote
 140 you wrong—my recollection is your testimony is that you
 didn't pay any attention to any signals because you didn't see
 any signals except, I think you said, the kick signal?
- A. I didn't say that.
- Q. You didn't see any signal; is that right?
- A. At what time?
- Q. During this operation that we are vitally interested in, the
 movement of this train back. Of course Rogers was the man to give
 the signals, wasn't he?
- A. Yes, sir.
- Q. And there is a difference between a kick signal and a back up
 signal, isn't there?
- A. Yes, sir.
- Q. A back-up signal is a motion, isn't it, by hand?
- A. Yes, sir.
- Q. And a kick signal is a motion not too high—if you give it
 too high, it is a high ball, isn't it?
- A. Well, it all depends on what kind of work you are doing.
- Q. The kick signal is a rapid motion of the hand—rapid or slow,
 according to the speed you want to move at; isn't that right?
- A. Sometimes they have got different signals.
- Q. Well, ordinarily, that is a kick signal, isn't it?
- A. Yes.
- Q. And the stop signal is, as has been given here, the downward
 motion of the hand?
- A. Yes, sir.
- Q. And they have a car signal for the different number of
 141 cars, when it is to be cut off, there is a signal which is given
 when you get one car, two cars and three cars?
- A. Yes, sir.
- Q. But you didn't have to have that signal given because the car
 was marked, you say?
- A. Yes, sir.
- Q. All the crew working about the train, in the ordinary and
 usual way the work was carried on by the crew—the men on top
 are supposed to watch the foreman to see what signals were being
 given, are they not, except you as a pin lifter?
- A. Well, they are not supposed to watch him necessarily unless
 they want to.

Redirect examination:

- Q. You say that they are not supposed to watch the foreman
 unless they want to. Now, I presume the jury doesn't exactly under-
 stand how you conduct your switching operations. Will you tell the
 jury what you mean by your answer so that they will understand it,

that is, your answer that the men in the crew don't watch the foreman unless they want to watch him for the signals. Do you mean to say that the pulling of the pin and the operations of kicking is made without any signals from the foreman? Go ahead and explain to the jury exactly what you mean by that answer.

A. Well, the foreman has to give the signals in order to have the kick and the men can be down in the field and not be looking anywhere near the foreman at the same time. It isn't necessary for them to know that there was one car or two cars or six cars to be cut off. All they are there for is to ride them.

Q. As I understand it, you cut the cars?

A. Yes, sir.

Q. You know what car to cut from the writing on the car?

A. Yes, sir.

Q. The foreman gives the signal to kick the car?

A. Yes, sir.

Q. And then field men ride the cars in?

A. Yes, sir.

Q. And when the cars start to back, they can see the car going back and they are supposed to get on and ride the car; that is true, isn't it?

A. Yes, sir.

Q. Therefore it isn't necessary that they receive any signal from the foreman; isn't that true?

A. Yes, sir.

Objected to as leading.

Q. Then these field men ride the cars after they have been cut off?

A. Yes, sir.

Q. And to do your work, as I understand it, you do not have to receive any signals?

A. No, sir.

Q. As I understand it, you stated to Mr. Anderson on cross-examination that as soon as the train starts to move back, you make the cut and then the foreman would give the stop signal at some point where he wanted the car to be put; is that right?

A. Yes, sir.

143 Q. How long have you known Holden?

A. I couldn't state how long I have known him. I don't know how long he was on the job.

Q. Did you know him before he went on the job?

A. No, sir.

Q. You and Holden ever have any trouble?

A. No, sir.

By Mr. Anderson:

Q. What was this rear car marked, what was the number on it?

A. 22.

Q. What was on the next car?

A. I couldn't tell you.

Q. What was on the next car?

A. I couldn't tell you.

Q. How did you know that you were only to cut one car off?

A. The car was marked 22 and the next to it was marked something else.

Q. But you don't remember the number?

A. No, sir.

Q. You just happen to remember 22, I suppose, in connection with the accident?

A. Well, I seen it on the car.

Q. You saw the others just as plain, didn't you?

A. The accident happened and I forgot all about it.

Q. But you didn't forget 22?

A. No, sir.

MAJOR ROY, sworn on behalf of defendant, testified:

By Mr. Janes:

Q. Mr. Roy, where is your home?

144 A. Well, I haven't got any home.

Q. Where do you live?

A. I live on Fifth street Northeast, Minneapolis.

Q. How long have you worked for the Great Northern Railroad Company?

A. A little over a year.

Q. How old are you, Mr. Roy?

A. Twenty-five.

Q. And how long have you been railroading?

A. Well, that is the only place I ever railroaded.

Q. And what did you do before you went to work for the Great Northern?

A. Well, I worked for the St. Paul Water Works Company.

Q. Were you working in this switching crew with Mr. Ward at the time he was killed?

A. Yes, sir.

Q. And what work were you doing at the time?

A. Throwing switches.

Q. You were not one of the field men, then?

A. No, sir.

Q. It wasn't your duty to ride the cars?

A. No, sir.

Q. You say throwing switches. Now, when would you throw those switches? How did you know when to throw your switches? Just explain it to the jury.

A. We have a slip and pencil and when we were going to pull a drag out on 14, the foreman would be ahead of us and mark the cars where they go and we followed behind and marked on our slip, and when we switched them out, all we had to do was to look on our slip and we could tell where they were to go, one cut go one track, the next cut to another track.

145 Q. As I understand you, Mr. Roy, that if the foreman

marks a car, we will say, with the figure 22, you know that that car is to go on track No. 22?

A. Yes, sir.

Q. And if he marks it with the figure 16, you know that that car is to go on track 16?

A. Yes, sir.

Q. Then it would be your business to throw the switch on track No. 16 to let that car in there?

A. Yes, sir.

Q. Or track No. 22 to let that car in there.

A. There would be another switch-tender supposed to be down there.

Q. In working on this lead, which is the yellow line on this plat on which are tracks numbered 15, 16, 17, 18, etc., how many switch-tenders were there in the crew that day?

A. In our crew there was two switch-tenders.

Q. Who was the other switch-tender? Was that Milander?

A. Yes, sir.

Q. That was Mr. Milander?

A. Yes, sir.

Q. What part of the yard was Milander working in? What switches was he throwing that morning?

A. He was throwing the switch down below and I was supposed to be up above.

Q. You were throwing the switches near to switch No. 14?

146 A. Yes, sir.

Q. And how far up the yard were you supposed to work?

A. Well, I was supposed to work to the 19th switch.

Q. And from the 19th switch on to the end of the yard, that was Mr. Milander's work?

A. Yes, sir.

Q. And that was his work that morning? was it?

A. Yes, sir.

Q. Did you see Mr. Ward under the car?

A. Yes, sir.

Q. Before he had been taken from under the car?

A. Yes, sir.

Q. Where were you at that time?

A. I think I was about the 15th switch.

Q. You were at the 15th switch, you think?

A. Just about, I think.

Q. Were you doing anything at that time?

A. No, sir.

Q. And where was Mr. Duffy?

A. Why, I don't know; I couldn't say.

Q. Did you see Holden there at that time?

A. No, sir.

Q. Did you see Holden riding the end car, this N. P. car?

A. I couldn't say.

Q. Where was Mr. Rogers at this time?

A. Well, I think he was between track 14 and track 13.

147 Q. On track 15 could you see the engineer or the engine?

A. No, sir.

Q. Why not?

A. Because there was some kind of a little curve.

Q. Because there was a curve there?

A. Yes, sir.

Q. Who was giving the signals to the engineer that morning?

A. Rogers.

Q. Was Mr. Rogers at that time to give all the signals——

A. Yes, sir.

Q. —to the engineer?

A. Yes, sir.

Q. And then Rogers stands out, of course, where he can be seen by the engineer?

A. Yes, sir.

Q. Can you tell the jury about how fast this train was moving just before you saw Mr. Ward on the ground that you have told us about?

A. Well, I hadn't been working there very long then, but I think it was going about four or seven miles an hour.

Q. You would say from four to seven miles an hour?

A. Yes, sir.

Q. Will you tell the jury whether or not this train was moving any faster than it is customary to move a train engaged in a similar operation?

A. No, I don't think it was any faster than usual.

Q. It wasn't?

148 A. No, I don't think so.

Q. Before you saw Mr. Ward on the ground, where was he, if you know?

A. I don't know; I couldn't say.

Q. Where was the last time that you saw Mr. Ward before you saw him on the ground?

A. Well, I couldn't say.

Q. Did you see him on top of the cars when the train was coming down this lead?

A. No, sir.

Q. Did you see anyone give any signals after you saw Mr. Ward on the ground?

A. Why, I seen Roger—

Q. You saw Rogers?

A. Yes, sir.

Q. And what signal did you see him give?

A. (Motioning.)

Q. A motion with both arms up and down?

A. Yes, sir.

Q. What did that mean?

A. Well, that mean- to stop quick, there was something wrong.

Q. How many cars had passed over the body of Mr. Ward?

A. I think it was one car.

Q. It was one car?

A. Yes, sir, one car and one pair of wheels.

Q. Were you there when he was taken out from under the car?

A. Yes, sir.

Q. Did you assist in taking him out?

A. Why, no, I didn't help.

Q. You didn't?

149 A. No, sir.

Q. Who took him out?

A. Why I think it was Roger and Mac, I don't remember his last name.

Q. McDonough?

A. Yes, sir.

Q. Anyone else?

A. That is all I can remember.

Q. Do you know Mr. Foellinger, the gentleman in the court-room here with the light hair?

A. Well, I don't know him by his name.

Q. See him there?

A. Which one is it?

Mr. Janes (to Mr. Foellinger): Stand up.

Gentleman in court-room stands up.

Witness: I think he was.

Mr. Anderson: You mean light in weight?

Q. Do you know whether Mr. Ward was alive or dead at the time he was taken out?

A. I think he was dead at the time.

Q. You think that he was dead?

A. Yes?

Q. You didn't hear him say anything?

A. No, sir.

Q. He didn't say anything?

A. No, sir.

Q. Where was his body in relation to the 16th switch?

A. Well, I think by 16th switch, probably four or five feet below the 16th switch.

Q. Would that be away from the engine?

A. Yes, sir.

Q. That is down the lead track?

150 A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. You say you didn't help take him out?

A. No, sir.

Q. And you didn't pay any particular attention to whether he was breathing or not, did you?

A. Well, I did a little.

Q. Well, how did you go about to see whether the man was breathing or not and when he stopped breathing?

A. I went close to him.

Q. How close did you get to him?

A. Why, probably three or four feet.

Q. Was he groaning?

A. No, sir.

Q. Are you sure?

A. I am pretty sure.

Q. Didn't you just come to the conclusion there that he must be dead?

A. Yes, sir.

Q. Because of the way he was hurt. You didn't have in mind to see whether he was dead at any particular moment or not, did you?

A. Well, I kind of look and see if he was hurt or not, kind of pay attention to that.

Q. But not very close?

A. Well——

Q. What?

A. Close enough to——

Q. Close enough?

A. Yes.

151 Q. Where do you stand in doing your work—which side of the lead track?

A. Well, we was supposed to stand on the other side of the cars.

Q. The 'north side. You stand where the switch-stands are, don't you?

A. How is that?

Q. You are over where the switch-stands are, aren't you?

A. Yes, sir.

Q. And were you at this time?

A. No, sir.

Q. What were you doing on the other side of the track on this occasion?

A. I was standing there looking.

Q. Well, didn't you have some switches to throw pretty soon?

A. Well, not at the time, no, sir.

Q. Well, pretty soon, I said.

A. Yes, sir, pretty soon, probably; I don't know.

Q. What was the first switch you were going to throw in this movement?

A. Well, I couldn't say.

Q. You don't remember?

A. No, sir.

Q. What were you doing at 16 then? What were you doing at the 16th switch?

A. Well, I wasn't at the 16th switch when they first started to switch.

Q. Well, where were you?

A. About the 15th switch.

Q. What were you doing there?

A. I was standing there and looking?

152 Q. Isn't it your business to go to the switch that you are going to throw first?

A. Yes, sir.

Q. Well, what switch was it?

A. Was 22 switch; I didn't have nothing to do with that.

Q. But you had some work to do, didn't you?

A. Not at the time.

Q. Well, you were going to have, weren't you?

A. Yes, I suppose I would after awhile.

Q. Well, didn't you——

A. If any cars goes on my side I would have some switches to throw.

Q. You worked between 14 and 19?

A. Yes, sir.

Q. And this train was switching this car to 22, was it?

A. Yes, sir.

Q. How do you know it was?

A. It was marked.

Q. What was the next car marked?

A. Well, I couldn't say.

Q. What was the first car on that train that you were going to switch in?

A. The first car on that train?

Q. Yes, when you would have a switch to throw, your movement.

A. I don't know.

Q. Did you know then?

A. No, sir, I didn't.

Q. What?

A. I didn't.

Q. You didn't know then even?

153 A. No, sir.

Q. How were you going to find out?

A. Well, as the car comes down I would look on my slip.

Q. On which side were those cars marked on?

A. They were marked on the other side of the switch.

Q. They are marked on the side where the tracks are?

A. Well, yes.

Q. And in order to throw a switch you would have to be on the other side?

A. Yes, sir.

Q. Now, just when would you look at a car to see whether it was your car or not?

A. Well, of course we are supposed to look on our slip. If the car go on my side I go over.

Q. How do you get over if they are switching down below your switch? Wait until the train pulls back up?

A. Yes, sir.

Q. Then you go over?

A. Yes, sir.

Q. What particular object would you have on the other side of the track?

A. Well, I don't know why I was there, something I couldn't say.

Q. Just happened to be there?

A. Yes, sir.

By Mr. Janes:

Q. As I understand it, you had no work to do at that time?

A. No, sir.

154 Q. This car was being sent down to switch No. 22?

A. Yes, sir.

Q. And when there was a car going in on one of your switches, I ask you whether or not you wouldn't go over and throw that switch?

A. Yes, sir.

F. M. FOELLINGER, sworn on behalf of defendant, testified:

By Mr. Janes:

Q. Mr. Foellinger, where are you living at the present time?

A. Chicago.

Q. Are you a married man?

A. Yes, sir.

Q. And what work are you doing now?

A. Working for Montgomery Ward.

Q. What are you doing for them?

A. Assistant foreman in the rubber shoe department.

Q. And how long have you been working for them?

A. Since the first of September last year.

Q. I presume you at one time were an employe of the Great Northern Railroad Company?

A. Yes, sir.

Q. Were you working for the Great Northern Railroad Company at the time that Mr. Ward was killed?

A. Yes, sir.

Q. And what work were you doing at that time?

A. Firing.

155 Q. Fireman on a Great Northern switch-engine?

A. Yes, sir.

Q. How long have you been working for the Great Northern?

A. From the 1st of September until March 1st.

Q. That is 1st of September, 1912, to March 1, 1913?

A. Yes, sir.

Q. And then you went from the employment of the Great Northern to the employment of Montgomery-Ward & Company?

A. I went back to Fort Wayne, my home town, and went to work on the Wabash.

Q. How long have you railroaded?

A. On and off about five years.

- Q. And what different work have you done as a railroad man?
A. Well, I have broke and I fired.
Q. You have worked as a brakeman and as a fireman?
A. Yes, sir.
Q. Where was the engine that you were firing on at the time Mr. Ward was killed? Where was your engine at that time?
A. In the B yards on the back lead.
Q. And near what switch in the C yard?
A. Well, between 14 and 15, I think, pretty close.
Q. How far apart are those two leads, that is, the lead that track numbers 14, 15 and 16 go off from the lead just east of it, where your engine was?
156 A. Well, about five feet, I judge. You mean the distance between the tracks?
Q. Yes, the distance between the tracks.
A. About five feet, I judge.
Q. Did you notice this train as it came down on that lead there on which Mr. Ward was working?
A. Yes, sir.
Q. What were you doing at that time?
A. I was standing in the gangway of our engine on the engineer's side, looking out.
Q. And how far were you from those cars as they came by you?
A. Well, when I first saw them they were probably two car-lengths from the engine gangway, the head of the engine.
Q. Which way was your engine facing?
A. East.
Q. It was facing toward the rear of the train that Ward was working on?
A. Yes, sir.
Q. Did you assist in taking Mr. Ward from out under the car?
A. Yes, sir.
Q. And where was his body in relation to switch 16?
A. Well, it was pretty close to switch 16.
Q. And was he alive or dead at that time?
A. Well, he was breathing slightly; you could just see it, and that was all.
Q. Did you see this man Holden there when you were taking him out or at any time?
A. No, I didn't.
157 Q. Did you see Ward on top of the cars or on the train?
A. Yes, sir.
Q. Where was he at the time you saw him?
A. Well, the first time I saw him he was on the second car from the rear of the train.
Q. And where was he the next time you saw him?
A. Well, while they were coming down I put in three shovelfuls of coal.
Q. I can't hear.
A. Right after I saw him the first time, I got around and put in three shovelfuls of coal in our engine and I got out in the gang-

way again and the cars separated and they were apart about four or five, maybe six feet, and I saw him come down over the end of the second car.

Q. You saw him fall?

A. Yes, sir.

Q. And did you notice about how fast this train was moving?

A. Well, to my judgment I think they were going about seven miles an hour.

Q. You, as I understand it, have worked there switching cars with your engine?

A. Yes.

Q. Now, I ask you whether or not this train was moving at that time any faster than it was customary to move cars in a similar operation.

A. No, sir.

Q. When you noticed Mr. Ward falling, as you have told the jury about, what movement was the train making at that time?

158 A. Backward movement.

Q. You may state whether or not they had started to slow up.

A. Well, yes, I think they had.

Q. What kind of a stop did this train make after you saw Mr. Ward fall?

A. Well, they made a pretty good stop, that is, there wasn't anything unusual about it or anything rough, what I mean, or any jolting; it was just an ordinary stop.

Q. No, I am asking you about the stop after you had seen him fall, whether or not there was a quick stop made.

A. Well, they stopped as quick as they could after they gave signals on the other side.

Mr. Anderson: Wait a minute; you didn't see those signals?

Witness: No, I didn't see any signals at all.

Q. But as I understand from what you have just said, at the time you saw him fall, the train was slowing up?

A. Yes.

Q. The end car had separated four or five feet——

A. Yes, sir.

Q. —from the second car?

A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. You had nothing to do with this train?

A. No, sir, I didn't.

Q. What were you waiting there for?

159 A. Waiting for our foreman to take down numbers of the cars that we were to work with.

Q. You had some cars on your engine?

A. Yes, sir.

Q. Your observation of this train was simply the observation of a man standing there with nothing to do; is that right?

A. Well——

Q. Casual observation.

A. We were working, in a sense of the word.

Q. You had nothing to do with this train?

A. No, sir.

Q. You had no interest in it?

A. No, sir.

Q. You were looking at it in just a casual way?

A. Yes, sir.

Q. Then when you speak of the speed, there was nothing that would cause you to pay any particular attention to the speed of that train, was there?

A. No, sir.

Q. So that when you say about seven miles, you are guessing at it, aren't you?

A. Well, no.

Q. When you are moving back at seven miles an hour, and you make an ordinary stop with fourteen cars, or thirteen after one is cut off, they are on those tracks and you make an ordinary stop at seven miles an hour, about how far does the train move under those circumstances?

A. Well, that all depends on whether it is down grade or up grade or——

Q. There where the train was, just in that spot.

160 A. Well, it stopped about a car or two cars from our engine.

Q. No, I mean the distance from the time the brakes are set, when you are backing up on that track, at that place, at seven miles an hour and you make the ordinary application of the brake. You know what I mean by your service application?

A. Yes, I understand.

Q. Then how far does the train move before it will come to a dead stop ordinarily?

A. About a car and a half or two cars.

Q. Isn't it a fact that when you are running a train of thirteen or fourteen cars, with a switch-engine out there in those yards, seven miles an hour, that your train will run four or five or six, sometimes seven or eight carlengths when you just make the ordinary application of the brakes?

A. Well, I expect it would in that, but regarding to this—after Mr. Ward was killed or on the ground, they gave a sharp signal for an immediate stop or to indicate that there was something wrong.

Q. Now, you saw that train, didn't you?

A. Yes, sir.

Q. You saw when the cars separated, you said?

A. Well, I didn't see them separate.

Q. You saw them separating?

A. Yes.

Q. And when you saw they were five or six feet apart, the car that was cut off was running away from the train, wasn't it?

A. Yes, sir.

Q. And that train was stopping, wasn't it?

A. The head end was, yes, slowing up.

161 Q. The hind end had to slow up before the cars separated, didn't it?

A. Why, some, yes.

Q. Certainly. In other words, when the engineer sets his brakes, the slack has to run out of the train back to the rear before that last car will leave the train, doesn't it?

A. Yes.

Q. So, when you saw them separate, the slack had all run out of the train then, hadn't it?

A. Yes, sir.

Q. And it is your judgment that as the train stopped then and there, it was a quick stop, wasn't it?

Mr. Janes: I ask that the counsel indicate what stops he refers to. The witness has testified two stops were being made there.

Q. Was there more than one stop made?

A. No.

Q. There was one stop, wasn't there?

A. There was one stop.

Q. Have you seen trains stop in emergency in your railroad service?

A. Yes, sir.

Q. As quick as they can stop them?

A. Why, yes.

Q. And did that train appear to you to stop that way?

A. No, sir.

Q. It didn't stop as quick as it could, apparently?

A. No, sir.

Q. How far did it leave the cars separated?

162 A. Well, after it run, it was just about two car lengths from the tender of our engine.

Q. Where was the rear of the train, where was this open space between the cars?

A. It was just about opposite to the front end of the cab on the engineer's side.

Q. As the cars came opposite your cab, the gangway?

A. Yes, sir.

Q. That rear car was running away then, wasn't it—separated?

A. Yes, sir.

Q. And you saw Ward going down in that space?

A. Yes.

Q. How far did the train run after that?

A. Well, now, it was about a car and a half or two cars from the rear of the tender of our engine.

Q. Past the tender of your engine?

A. Yes.

Q. All right. That is a pretty quick stop, isn't it?

A. Well, nothing unusually fast. It was a pretty good stop.

Q. You weren't impressed with the thought then at the time that that train was stopping as quick as the engineer could stop it? I mean after the moment you saw Ward going down?

A. Why, no.

Recess till 2 p. m.

It is stipulated that the distance between the switchstands is between 90 and 100 feet.

By Mr. Janes:

163 Q. If I understand your answers to Mr. Anderson's questions, at the time you saw Ward falling from the top of the car, the train at that time was slowing up?

A. Yes, sir.

JULIUS BRINSTAD, sworn on behalf of defendant, testified:

By Mr. Janes:

Q. Mr. Brinstad, where do you live?

A. 736 Pierce street, Minneapolis, Northeast.

Q. And I believe you are working for the Great Northern Railroad Company?

A. Yes, sir.

Q. Were you working for the Great Northern Railroad Company in the month of December, 1912?

A. Yes, sir.

Q. How long have you been working for the Great Northern Railroad Company?

A. Twenty-two years.

Q. And in what capacity have you been working for the company?

A. Firing and running.

Q. What do you mean by running?

A. Running locomotive.

Q. Firing a locomotive?

A. Yes, sir.

Q. And as an engineer on a locomotive?

A. Yes, sir.

Q. Were you the engineer of this locomotive that was handling the cars on the switches that have been referred to here, on 164 the 13th day of December, 1912, at the time Mr. Ward was killed?

A. Yes, sir.

Q. Who was your fireman on that engine?

A. Eddy Stellick.

Q. And who was the foreman of the switching crew?

A. Rogers.

Q. And how long had you been working with Rogers in switching operations for the Great Northern?

A. I had been working for Rogers three or four months, probably, more or less.

Q. Do you know how long Rogers had been working for the Great Northern Railroad Company as a switch foreman?

A. No, sir, I do not.

Q. Now, looking at Def't's Ex. 4, before you took your train down on to the lead on which switches 15 and 16 are situated, where was your train?

A. Up here on 11.

Q. On track No. 11?

A. Yes, sir.

Q. And where had you come from on to track No. 11?

A. Coming east off of 14.

Q. Do you know how far you had run up on to track No. 11 after you came off of track 14?

A. I don't know how far the rear end was only what the boys say—they were over 14.

Q. For what purpose did you go up on to track No. 11?

A. To switch that train.

165 Q. On to what track?

A. The different tracks on the lead.

Q. That is, on the lead where tracks 15, 16, 17, and 18 lead off from?

A. Yes, sir.

Q. From whom were you receiving signals?

A. Mr. Rogers, the foreman.

Q. Where was Rogers at that time?

A. Why, he was standing down towards the rear of the train. I don't know exactly just how far but right in plain view where I could see him.

Q. When you backed your train up from track No. 11 on to the lead shown in the yellow line on this exhibit, from whom did you receive that signal?

A. From Mr. Rogers, the foreman.

Q. And what kind of a signal did he give you?

A. Rogers give me—there is two kinds of kick signals. He gave me—that is his signals every time (illustrating).

Mr. Janes: Witness indicating by motion of his arm.

Witness: The other signals are this way (indicating).

Q. And indicating the other kick signal as a shake of the hand. And Mr. Rogers gave you the signal which you have indicated, a motion of the arm, to back up?

A. Yes, sir.

Q. And for what purpose were you backing up onto the lead track?

A. Because I got the kick signal.

Q. What did you intend to do with the cars?

166 A. I don't know. I suppose they were cutting them off, I don't know; they were switching.

- Q. They were switching those cars at that time?
- A. Yes, sir.
- Q. And what was the next signal that you got after you received this kick signal, if any?
- A. A stop sign.
- Q. Whom did you get that signal from?
- A. Mr. Rogers, the foreman.
- Q. And what kind of a signal was that?
- A. Both arms this way (indicating).
- Q. And what did that mean?
- A. Stop.
- Q. And when you received that signal, what did you do, if anything?
- A. Immediately he repeated the same very hard once, the same way.
- Q. No, you don't understand my question. After you got the stop signal, that you just tell the jury about, what did you do, if anything with your engine?
- A. Oh, I put the brake on.
- Q. And then after you got this stop signal that you first told the jury about, did you receive another signal from Mr. Rogers?
- A. Right immediately before the engine stopped.
- Q. And what was that signal?
- A. The same kind, but it was a little harder stop.
- Q. What do you mean by being a little harder stop? How did he indicate that to you?
- A. He came down harder this way.

167 Mr. Janes: Witness moving his arms up and down several times.

- Q. Did Mr. Rogers move his arms up and down more than once?
- A. Yes, he did.
- Q. And after you received that signal from Mr. Rogers what did you do to your engine, if anything?
- A. The engine stopped. I had the brakes on.
- Q. At the time that you received this first signal that you told the jury about and before you received the second signal, had you put the brake on?
- A. Not until I got the first signal to stop.
- Q. Yes, that is what I mean.
- A. Yes, sir.
- Q. And then you received the second signal?
- A. Yes, sir.
- Q. What more did you do to your engine, if anything, after you made the second signal?
- A. Not any more than only I kept the brake on.
- Q. Do you know about how far your engine moved after you put the brakes on?
- A. Well, it looked to me about half a carlength, probably a little more than that, probably between half a carlength and a carlength.

Q. Did you see anyone else give you any signals at that time other than Mr. Rogers?

A. Yes, sir, Mac.

Q. Mac who—McDonough?

A. Yes.

Q. The man who has been on the witness stand here?

A. Yes, sir.

Q. Where was Rogers standing at the time he gave you these signals that you have told the jury about?

A. At the rear end of the train.

Q. And in relation to switch No. 14, where was he standing?

A. Well, I don't exactly remember, somewhere down around the read end.

Q. Was he standing on the north or the south side of track 14?

A. Well, he was standing on this side of 14. The engine was headed east. He was standing on this side.

Q. Would that be south?

A. South. He was standing on this side.

Q. That would be on the south side of track 14?

A. That is right.

Mr. Anderson: The same side he was on.

Q. How long have you been running a switch-engine, did you say?

A. November 20, 1900.

Q. The movement of the engine, after you received this stop signal from Mr. Rogers, the first one, I ask you to tell the jury whether or not you handled the engine in the usual and customary manner in handling an engine under those conditions and circumstances, the switching movement that you were making at that time.

A. Yes sir.

Q. Was there anything unusual about the movement of the engine?

A. No, sir.

Q. Before you received that second stop signal from Mr. Rogers?

169 A. No, sir.

Q. How fast was this train traveling before you received the stop signal from Rogers?

A. I think it was moving between five and eight miles. It is pretty hard to tell in such a short distance.

Q. Between five and eight miles an hour?

A. I think so, about that.

Q. You may state whether or not that is the usual rate of speed in moving cars under those circumstances.

A. Oh, yes, from four to eight or ten miles.

Q. From where you were in the cab and after the train had gone down on to the lead track, that is, the rear of the train, could you see the rear end of that train?

A. No, sir.

Q. Why not?

A. On account of the curve.

Q. Standing at switch 14, could a person see or give signals to the engineer on the train?

A. At 14, yes, sir—straight track.

Q. At switch 15, could he?

A. No, sir.

Q. And why not?

A. It is on the curve?

Cross-examination.

By Mr. Anderson:

Q. What kind of brakes did you have on the engine?

A. Two kinds of brakes.

170 Q. Both straight air and the automatic?

A. Yes, sir.

Q. Which were you using?

A. The straight air.

Q. Both working with the same quickness?

A. No, the straight air works quicker.

Q. But with the same force, however, according to the manipulation?

A. Well, it takes longer for the automatic.

Q. But I say you can get the same power on your brakes?

A. Yes, sir.

Q. The pressure that you get comes from the air reservoir on the engine?

A. Yes, sir.

Q. You usually carry that at about ninety pounds?

A. Yes, sir.

Q. And you can apply the brakes slightly, medium or hard, can't you?

A. Yes, sir.

Q. All depending upon the distance you move your little air-valve or handle?

A. Yes, sir.

Q. Now, you have what would be called ordinarily a service application?

A. Yes, sir.

Q. And you have also the emergency application?

A. Yes, sir.

Q. Which do you usually make use of in ordinary, every day switching operations when kicking cars—the emergency or the ordinary service?

171 A. The ordinary.

Q. Now, you said that after you had set the brakes, in response to the first signal, you after that simply kept the brakes on?

A. Yes, sir.

Q. As a matter of fact after you first applied your brakes, if you then got another stop signal, you couldn't apply the brakes any more, could you?

A. I had her out here, in the first place.

Q. You couldn't make an emergency application, could you, after making ordinary?

A. Why, certainly, with the straight air.

Q. Without releasing?

A. Yes, sir.

Q. Just give it more?

A. Yes, sir.

Q. Did you give it any more than you had on?

A. I gave her the emergency.

Q. Oh, then you did do something else after the other signals?

A. Yes, sir.

Q. In about what distance would that train have stopped with the ordinary application running as you claim to have been running at that time?

A. Well, the ordinary would have stopped in about a car and a half or two cars.

Q. An ordinary stop of fourteen cars?

A. Yes, sir.

Q. How many pounds pressure do you call the ordinary application?

A. 45 pounds on each brake-cylinder.

Q. How much can you possibly get in the brake-cylinder?

172 A. 45, that is all.

Q. That is the limit, isn't it?

A. Yes.

Q. Is that the ordinary application?

A. Yes, sir.

Q. Then what is the emergency?

A. No, not the ordinary, no, sir.

Q. I asked what the ordinary was.

A. Well, from five to ten and up as high as you want to go—to 45.

Q. How quick could you stop that train moving at seven or eight miles an hour in an emergency application?

A. That depends on the rail.

Q. Well, there at the time as you were running at that time; suppose you had applied the emergency in the first place, in what distance could you stop?

A. About a carlength.

Q. How quick could you stop a light engine in emergency running seven miles an hour?

A. Why, you could stop in a few feet.

Q. Can you stop in less than an engine length?

A. Yes, sir, in emergency.

Q. In less than the engine length?

A. Yes, sir.

Q. How much did your engine weigh?

A. Oh, I don't remember; 135,000 pounds I think it is.

Q. A very large engine?

A. Yes, sir; probably more.

Q. And you had 13 cars in the train, it appears here, in the evidence; I don't know as you know.

173 A. Yes, sir, I didn't count them.

Q. Each car in your train when empty weighed about how much?

A. Oh, I don't know, I couldn't say exactly.

Q. Don't you know how cars run generally on weights?

A. I never pay any attention to that.

Q. Well, they run along about 40,000 pounds, don't they?

A. I couldn't say; I don't remember. I have seen lots of times but—

Q. How far did you run before you got the stop signal?

A. About four carlengths, I think.

Q. You have no trouble in getting up a speed of eight miles an hour in four carlengths, have you?

A. No, sir.

Q. Of course you might have been farther than that, so far as you know, and didn't pay any particular attention, I take it?

A. I don't think I was any farther.

Q. Can you get up a speed of eight miles an hour in two carlengths?

A. I can on the rails.

Q. There at that place as it was then, could you?

Mr. Janes: I presume assuming the same train?

Mr. Anderson: The same train, yes.

A. I don't think you could.

Q. Could pretty near it?

A. I don't think so.

Q. Well, after you get up to six miles an hour you can very quickly get up to ten, can't you?

A. Yes, sir.

Q. Now, in doing such work as you were doing at that time, backing up, kicking cars off, it was a very usual occurrence for switchmen to be on top of your train, was it not?

A. On top and on the ground, both.

Q. Yes, but I mean on top, one or more would be on top very frequently?

A. Well, sometimes and sometimes not.

Q. Just as apt to be one way as the other?

A. Of course I don't watch them, you know.

Q. When you stop a train by an emergency application, running even from five to eight miles an hour, backing up as you were there at that place, if you make an emergency application of the brakes, it causes a very decided, severe jerk to the rear of your train, doesn't it?

A. Yes, emergency.

Q. Yes. In other words, in working as we call it, in the usual and customary way, you have to exercise care, don't you, as to how you stop that train?

A. Yes, sir.

Q. Otherwise you are very apt to jerk people off the cars?

A. Jerk out drawbars.

Q. Well, we are thinking more of the people now. It is pretty hard to stand on top when you put an emergency application on, isn't it?

A. Yes, sir.

Q. And it is your experience, isn't it, that you can give a harder jerk to the rear of a train like this by an emergency application of the brakes, running eight miles an hour, than you can running 15, isn't that true?

A. I didn't understand the question.

Q. You can give a harder jerk with an emergency application to the rear of the train of 13 cars, when you are running at eight miles an hour than you can give to it by an emergency application running fifteen?

A. Yes, sir.

Q. The reason of that is when you are running slow, the brakes take hold of the wheels with a greater grip and force; isn't that right?

A. Running slow?

Q. Yes.

A. It depends on how you put the brake on.

Q. Emergency.

A. Well, in emergency, yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. When you are running fifteen miles an hour, you have to overcome that speed first, before you can give that quick, hard stop?

A. Yes, sir.

Q. So that unless there is danger or something of that sort, it is extraordinary to put on an emergency application?

A. Yes, sir.

Q. When you are operating in the ordinary way, no trouble is experienced in standing on top of the train, is there?

A. No, sir.

176 Redirect examination.

By Mr. Janes:

Q. Now, as I understand it, you didn't put on this emergency application of the brake until after you had received this second signal from Mr. Rogers?

A. Yes, sir.

By Mr. Anderson:

Q. With the automatic air, when you make your service application, you couldn't then put it on the emergency, could you, with the automatic?

A. No, sir.

By Mr. Janes:

Q. You were not handling your engine at that time with the automatic air?

A. No, sir.

Q. You were handling your engine with the straight brakes?

A. Yes, sir.

Q. Is that what you had been handling your engine with that day?

A. In the yard service all the time.

Mr. Anderson: That will be conceded; there is no question about that.

EDWARD STELLICK, sworn on behalf of defendant, testified:

By. Mr. Janes:

Q. Mr. Stellick, where do you live?

A. 802 Third Avenue Northeast, Minneapolis.

Q. You are working for the Great Northern Railroad Company at the present time?

A. Yes, sir.

177 Q. And how long have you been working for the Great Northern?

A. Oh, about six years and a half.

Q. And what have you been doing for the Great Northern?

A. Well, I have had different jobs.

Q. Well, what kind of work?

A. Well, working in the roundhouse and carry mail and firing and throwing switches.

Q. How long have you been firing for the Great Northern Railroad Company before the 13th day of December, 1912?

A. From the 6th day of August.

Q. Were you the fireman on the engine of which Mr. Brinstad was engineer on the 13th day of December, 1912?

A. Yes, sir.

Q. That was the time Mr. Ward was killed, wasn't it?

A. Yes, sir.

Q. You heard Mr. Brinstad's testimony?

A. Yes, sir.

Q. As I understand it, your engine and train had come up from track 14 on to track 11?

A. Yes, sir.

Q. For the purpose of switching some cars on this lead switch that we have been talking about here?

A. Yes, sir.

Q. And that after you had got beyond the lead switch, the engine was backed up?

A. Yes, sir.

Q. Did you know Mr. Ward?

178 A. No.

Q. Did you see a man on top of these cars?

A. Yes, sir.

Q. Whom you afterwards learned to be Mr. Ward?

A. Yes, sir.

Q. And where was he when you first saw him?

A. I saw him when he was disappearing; that is all I saw of him.

Q. And was he on top of the train at that time?

A. On top.

Q. Do you know what car? referring to the end of the train that he was on?

A. I do not.

Q. Could you tell from where you were whether or not he was on the end car or the car next to the end car?

A. No, sir.

Q. Do you know whether or not the brakes on the engine had been applied just before you saw Mr. Ward disappear from the top of the car as you told the jury about?

A. Just about the time I seen him falling or seen him disappear. I didn't know whether he fell or not until after it happened.

Q. And when you saw him disappear, did you say anything to the engineer at that time?

A. Yes, sir, I hollered to him.

Q. And what did the engineer do?

A. Why, he was just getting a signal himself just at the time I hollered.

Q. And what did he do as far as putting on the brakes or making the application of the brakes after you spoke to him?

A. I couldn't see him over there.

Q. But you did speak to him or holler to him?

A. Holler to him.

Q. And just before you saw this man disappear, you may state whether or not the engine was slowing up at that time and the train.

A. Yes, sir.

Q. Do you know about how far the engine moved after you saw the man disappear?

A. Just about a carlength.

Q. Did you go down to Mr. Ward?

A. I did later on, yes.

Q. And how long was that after the engine was stopped?

A. That I went down?

Q. Yes.

A. Oh, it must have been twenty or twenty-five minutes after.

Q. Do you know about how fast this engine was backing up—

A. No.

Q. —At the time and just before you noticed this man disappear from the top of the car?

A. No, I couldn't tell how fast it was going.

Q. Were you moving at the same rate of speed as is usual and customary to move a train under those circumstances?

A. The same as we always did there.

Q. You may state whether or not this train was being handled in the usual and customary manner up to the time that you saw this man disappear.

180 A. It was handled in the same way as it always was while I was there.

Cross-examination.

By Mr. Anderson:

Q. Well, at any rate, the train was stopped this time quicker than usual, I take it?

A. Oh, yes, it was.

Redirect examination.

By Mr. Janes:

Q. That train was stopped quicker than usual after you saw this man disappear, wasn't it?

A. Yes, sure.

Q. And that was after you had seen this man disappear that the train was stopped quicker than usual, wasn't it?

A. Yes, sure.

ANDREW DUFFY, recalled on behalf of defendant, testified:

By Mr. Janes:

Q. If I recall correctly your testimony, you stated this morning that Holden got on to this end car; that would be car 15 or car 14, the end car, this Northern Pacific car, about the 15th switch. In relation to the 15th switch where did Holden get on to the end car?

A. Between the 14th and 15th switch.

Q. And if a man was standing at the 15th switch giving signals to the engineer, could the engineer see him at that point.

181 A. No, sir.

Q. Or could he see the engineer.

A. No, sir, not at the 15th switch. He couldn't see at the 15th switch.

M. L. COUNTRYMAN, sworn on behalf of defendant, testified:

By Mr. Janes:

Q. Mr. Countryman, I believe that you are one of the attorneys of the Great Northern Railroad Company?

A. I am.

Q. And have been for a number of years?

A. Yes, sir.

Q. Do you recall meeting the gentleman here, Mr. Ward, in your office some time in the month of January, 1913?

A. I remember meeting Mr. Ward once, but I do not remember the month.

Q. And do you recall who was with him at that time?

A. Well, there was another man with him, but I don't remember his name. It wasn't anyone that I knew.

Q. His brother-in-law; Mr. Lorenz, was that the name?

A. Well, I think so, but wouldn't be positive about that.

Q. Was Mr. Dugan or Mr. Kimball there at that time?

A. My impression is that Mr. Dugan or Mr. Kimball, or possibly both of them, brought him into my office. I know they
182 were both present during the interview—some part of it.

Q. And at that time you had a conversation with Mr. Ward relative to a settlement of this case, that was the subject-matter of the conversation?

A. Yes, that was the subject of the conversation.

Q. During that conversation did Mr. Ward say anything to you about the amount of money that his son had been contributing to the family?

A. Yes; that matter was discussed.

Q. What did Mr. Ward say at that time relative to the contributions that his son had been making?

Objected to as not the proper form of question.

Question withdrawn.

Q. At that time do you recall Mr. Ward stating that his son had been contributing about \$100 a year to the support of the family?

A. Yes, that is what Mr. Ward said, in substance.

Cross-examination.

By Mr. Anderson:

Q. Just one question, Mr. Countryman: Do you recall now that he used at any time "contribution" or contribute to the family?

A. Oh, I think he answered my questions. My recollection is that I asked him how much the boy was paying or contributing towards the family. I wouldn't swear exactly to the form of my question, but he answered it, stating the amount during the last five years.

Q. The only reason I asked, Mr. Ward spoke something about, he told me how much he paid to him. Do you remember
183 whether there was anything definite as to whether it was what he got?

A. No, my questions were as to what he had done toward the support of his family during the last four or five years.

Mr. Janes: And this conversation was had for the purpose of arriving at a basis of settlement in this case; was the object of it?

A. Well, we had previously made Mr. Ward an offer and we were discussing the question of the reasonableness of that offer. That was the substance of our conversation. A large part of the conversation related to the matter of how the accident occurred and to statements made by one of the persons present who was then, I think, in Texas, but in the course of the conversation we also discussed this question of how he had supported his family.

Mr. Anderson: You have been identified here as the man with the pipe.

Witness: Well, I have got it in my pocket.

Mr. Anderson: You must be the man, then.

I. T. DUGAN, sworn on behalf of defendant, testified:

By Mr. Janes:

Q. Mr. Dugan, I believe that you are an employe of the Great Northern Railroad Company?

A. Yes, sir.

Q. In what department?

A. The general claim.

Q. And how long have you been connected with the claim department?

A. Thirteen years.

184 Q. What is your official title?

A. Assistant claim agent.

Q. Mr. Dugan, it has appeared here in evidence that a man by the name of W. D. Rogers was foreman of the switching crew in which Mr. Ward was working at the time he was killed. Do you know whether or not Mr. Rogers is now in the service of the Great Northern Railroad Company?

A. I know that he is not.

Q. And do you know when he left the service of the Great Northern?

A. No, sir, I do not know that.

Q. Has there been any effort made to get Mr. Rogers to appear here at the trial of this case?

A. Yes, sir.

Mr. Anderson: By Mr. Dugan, of course.

Witness: Yes, sir.

Q. What is your answer?

A. Yes, sir.

Q. And what have you done to—

A. When we were notified the case was for trial we had Mr. Rogers' address—

Q. Speak a little louder.

A. When the case was noticed for trial we had Mr. Rogers' address in Minneapolis. I sent Mr. Howe, one of the assistant claim agents, over there to the address and told him to notify Mr. Rogers that we would need him. He did so, at least he reported to me that he did so. Just shortly after that I was looking up Mr. Rogers' record upstairs to see if they had any inquiries in our employment bureau, and one of the clerks up there told me that Mr.

185 Rogers has just sent them a letter asking the department upstairs to send his clearance to general delivery in Chicago; so I immediately sent a telegram to Chicago notifying the Western Union operator to mail it to the Chicago office, general delivery.

Q. Did you receive a letter from Mr. Rogers?

A. Mr. Rogers wrote a letter to Mr. Howe stating that he had just noticed some writing on the back of his card when he got into Chicago and stating that he would be willing—

Mr. Anderson: What is this—a letter?

Mr. Janes: Yes.

Mr. Anderson: Have you got it with you?

Witness: Yes, I have.

Mr. Anderson: Let's have the letter, put it in evidence.

Witness: There is nothing in it.

Mr. Anderson: Well, just read it.

Witness (reading): "Dear Sir: I found a card addressed to me but didn't notice writing on back until I looked it over here in Chicago. Now, Mr. Howe, if I can be of any service to you, kindly let me know and I will gladly give you any information I can give."

The date of that is January 8th, of this year.

Q. Have you heard from Mr. Rogers since then?

A. Yes, sir. I immediately sent a wire to him down there followed with a letter, telling him to call on our general agent for a ticket to St. Paul and to come up here. I received another letter which I don't think Mr. Anderson would like to have in evidence.

Letter marked Def't's Ex. 5.

186 Mr. Anderson: I object to the letter being introduced in evidence in this class of testimony where the witness undertakes to express his opinion as to the merits of the case until I can cross-examine him. If you want it, you can read all the letter excepting where he undertakes to express his opinion, if it will do you any good.

Mr. Jones: I think we ought to have it all if we have any of it.

Q. What is the date of that letter?

A. The date of that is January 12th of this year.

Q. And where was he at that time?

A. He was in Chicago; no address, general delivery.

Q. After you received that letter, what did you do, if anything?

A. I immediately sent him a Western Union wire, care of general delivery again, advising him that it was of the utmost importance for him to come to St. Paul as a witness in this case.

Q. Do you know whether or not that telegram was delivered?

A. No, sir, I do not.

Q. You sent that general delivery?

A. We have received no answer at all to that.

Q. And that is all you know about Mr. Rogers?

A. That is all I know about Mr. Rogers.

Q. Now, Mr. Dugan, do you know Mr. Ward, the father of this man who was killed, the gentleman sitting on the end row here?

A. Yes, sir, I do.

Q. Do you recall him coming to your office in the Great Northern building in the city of St. Paul?

A. Yes, sir.

Q. Do you recall having conversation with him relative to this case?

A. Yes, sir.

Q. Do you recall whether or not he came to your office more than once?

A. He was there at least twice; I don't know how many more times.

Q. And at both of those times the matter of a settlement of case was discussed?

A. I wouldn't say at to that, either, because the first time he in was very soon after the accident, and I don't think we discussed the settlement at all at that time.

Q. You were in the court-room when Mr. Countryman testified. A. Yes, sir.

Q. Were you in Mr. Countryman's office at the time that this conversation occurred between Mr. Countryman and Mr. Ward?

A. Yes, sir.

Q. Do you recall whether or not in that conversation Mr. Countryman said anything to you about the contributions that his son had been making to the family?

A. Yes, sir.

Q. Do you recall whether or not Mr. Ward said in that conversation that his son had been contributing about \$100 a year to the family, as near as he could get at it, or words to that effect?

A. He said that.

188 Cross-examination.

By Mr. Anderson:

Q. Taking up the subject of your vigilance: You are kept advised, are you not, as assistant claim agent of law-suits when they are started?

A. Yes, sir.

Q. And were you advised as to when this case was started?

A. When it was started, substantially, yes, sir.

Q. It was noticed for trial for the June, 1913, term?

A. Yes, sir.

Q. Do you remember something about that?

A. I remember it was on for trial once before. I don't know exact time.

Q. And you recall that June is the last month in which law cases before the summer vacation?

A. Yes, sir.

Q. And the case has been on the calendar from month to month ever since?

A. Yes, sir.

Q. I am not quite sure, but it came up and was continued several times, wasn't it?

A. I think it was, Mr. Anderson.

Q. Once or twice, it has been passed along.

A. At least once.

Q. When did you first begin your efforts to locate Mr. Countryman and have him where he would be available as a witness in this case?

A. When the case was on the first time.

Q. In June?

A. I think it was June, Mr. Anderson.

189 Q. Was he then in the employ of the company?

A. I can tell you exactly because I have the memoranda.

right here (referring to memorandum): It must have been in October.

Q. Oh, yes, it has been on ever since last June on the calendar.

A. It was in October at the time when it was set for trial when I looked up Mr. Rogers again.

Q. Was he working for the company?

A. I am not positive. No, he wasn't working for the company at that time.

Q. Did you locate him then?

A. Yes, sir, we did; that is, not exactly located him, but we found out—we got information as to where we could find him. We heard that he had gone to work for another firm here and the two names had got mixed. We had the wrong initials and we thought he was working for Morris. We wired to Chicago trying to get him. We found he wasn't the man, and just at that time we noticed that the case was continued and wouldn't be reached for two or three months.

Q. And so you dropped the matter then?

A. I am not certain, I think Mr. Howe located Mr. Rogers after that time, but I am not certain.

Q. Never made any effort to arrange to take his deposition after he left the city, did you?

A. He only left the city just a little while ago, as I understand it.

Q. I thought you said last October you found him in Chicago?

A. No; we got his address from Morris & Company, the stock man here. He was supposed to have gone to work for Morris & Company here in St. Paul. The head of their firm is in Chicago and we wired them asking if he had gone to work for them.

Q. Isn't Rogers a married man?

A. I heard that his wife had gone to Chicago three or four months ago.

Q. And he had a home in Minneapolis, didn't he, last June?

A. He had a home there just a little while ago.

Q. When did you first learn that he had left the state?

A. The first time I learned he had left the state was when Mr. Howe left the card. He had not left the state when Mr. Howe left the card over there on January 6th.

Q. Oh, he just left the state?

A. He just left, yes.

Q. Did you ever subpoena him at any time?

A. No, sir.

Q. Did you ever issue a subpoena for him?

A. Not that I know of; I did not.

Q. How long had he worked for the company?

A. I can't say as to that; I don't know.

F. J. HOLDEN, recalled for further cross-examination, testified

By Mr. Janes:

Q. As I recall your testimony yesterday, you and Mr. Roger were standing near switch 15?

A. Yes, sir.

Q. That is correct, is it? And about how far from switch 15?

A. Right alongside of it, when the train pulled up her
191 and we backed on 14, back about ten feet in clear view of the engineer.

Mr. Janes: There is no claim of defect?

Mr. Anderson: We don't claim any defect in anything.

It is stipulated that Mr. Kimball, if present, would testify substantially the same as Mr. Countryman and Mr. Dugan.

Defendant rests.

Plaintiff rests.

Testimony closed.

Case summed up to the jury by counsel for respective parties whereupon the Court instructed the jury as follows:

Charge.

Gentlemen of the jury, the Capital Trust Company as administrator of the estate of William Ward, deceased, sues in this action to recover for the use and benefit of his parents the sum of \$35,000 as damages for injuries and the death of said Ward on the 13th day of December, 1912, alleged to have occurred through the alleged fault and negligence of this defendant company.

The defendant admits that it is a railroad corporation. Defendant admits that it owned and operated certain lines of railway in the state of Minnesota and other states and it operated an interstate line of railroad and in connection therewith certain railroad yards and the yard referred to as the Hamline yard at Twenty-fifth Av. Southeast, Minneapolis, and it admits that it operated over those lines certain locomotives and cars and equipment and that a
192 the time of the death of Ward that the defendant was engaged in interstate commerce and that Ward was killed while engaged in such work, and that his death was due to his falling from a freight car on which he was at work and in being run over by passing cars.

The defendant denies that it was negligent. The defendant denies that Ward was killed through any act of negligence on the part of any of its servants. The defendant alleges that Ward was killed through his own want of care and his own negligence, and the defendant further alleges that Ward had full knowledge of the dangers, hazards and risks of his employment and that he assumed them all, and that the defendant is not liable.

Now these claims made on the part of the plaintiff in respect to the negligence of this defendant and its liability to the plaintiff and the denial of these claims by the defendant, raises sharp issues

of fact or questions of fact as they are called, and the purpose of this trial is to produce before you the testimony of the witnesses who were present and saw the matters out of which this action has arisen, in order that you may hear their testimony and upon that testimony decide these questions or issues of fact, so that your verdict may form the basis of a judgment between these parties which shall determine their legal rights.

Now, the mere fact that Ward was an employe of this company and that he was killed by falling from the top of a car and being run over, standing alone, does not entitle the plaintiff in this case to

recover. Before plaintiff can recover, it must go further and must prove that Ward's death was due to the breach of some legal duty which this defendant owed Ward under the circumstances. And the law requires plaintiff, in order to recover in this case, to prove that this defendant company acting through its servants who were engaged in that switching operation was negligent and that such negligence was the cause of Ward's death.

If negligence exists it is a fact which must be proven like any other fact by a preponderance or greater weight of the evidence, and if it is not so proven, it is taken not to exist. So in this case, the burden of proof rests with the plaintiff to establish the negligence charged against this defendant by a preponderance of the evidence; and if the plaintiff does not sustain the burden of proof in that respect, then the plaintiff would not establish his case and of course could not recover.

Now, it appears that Ward was a member of a switching crew employed by the defendant in its Hamline yards; that he discharged the duties of a helper or a field man, and in switching operations was frequently required to go upon the moving cars and when the cars were cut off from a string or train, his duty required him, under certain circumstances to ride them down onto the proper track. It appears that his crew consisted of a foreman by the name of Rogers, two switch-tenders, and Duffy the pin-puller and two other helpers named Holden and McDonough, besides the engineer and fireman on the engine. It appears that certain cars, about fifteen in number, I believe, were standing on a track designated as track No. 14, which runs east and west in that yard.

The engine was coupled on the east end of this string of cars. It appears that one of the operations in handling these cars is what is known as the kick switch. And from the testimony I think it appears that a kick switch is made by uncoupling a car at or near the rear, giving it speed with the engine, which then stops and the car runs on by its own momentum thus acquired in and over the desired switch and onto the desired track. It appears that these cars which stood on track 14 were to be distributed on the several different tracks in that yard, and that the yard at that place consists of a score or more of tracks, each of which is designated by a number according to its location in the yard; and that the engine pulled this string of cars out of track 14 over switch 14 in an easterly movement onto what is called track 11 which is a continuation of track 14, and then the engine started to push these cars by backing

in and upon the lead-track which runs transversely from track 11 in a northwesterly direction and which at regular distances leads to and by means of switches opens into other tracks parallel with track 14 and referred to as tracks 16, 18, 20, 22, etc. And it appears that all these cars in this string were intended to be put in upon these different tracks and that the foreman Rogers was in charge of the work and gave the signals for the different movements to the engineer and where necessary to the men. It appears that the end car was to go down to track 22; that Rogers gave the signal to back up onto the lead, then gave a kick signal and while the train was
195 backing, Duffy pulled the pin cutting off the last car, and that this car was kicked to go down on to track 22; that then Rogers gave some kind of a stop signal, and there is a sharp dispute in the evidence in this case in respect to the character of the signal which Rogers gave at that time. That the train then began to stop, and as the end car drifted away from the rest of the train four or five feet, Ward fell from the rear end of the next car to the tracks and was run over and died from the effects of his injury.

Now, the plaintiff claims that this defendant was negligent through its foreman and servants at that time and place, first, in failing to warn Ward that the last car was to be cut off, and in failing to give him time in which to reach the last car before stopping the train; second, they say that the defendant was negligent in running these cars too fast; third, they say that the defendant was negligent in stopping these cars too quick; and that these acts or some of them threw Ward to the ground between the cars. And in this connection, the plaintiff claims that the foreman Rogers gave the kick signal, and an emergency signal instead of the usual service signal for stopping and that an unusual jerk or movement of the cars was thus caused which threw Ward off.

The defendant denies this and claims that the speed did not exceed five to ten miles an hour. Plaintiff claims it was some fifteen miles an hour. The defendant claims that Ward was not required to ride the last car down because it was an empty car, and that in
196 their operations they are only required to ride down a loaded car. Defendant claims that Rogers gave the usual stop signal and that the emergency stop signal was not given by Rogers until after Ward had fallen, and then for the purpose of stopping the train as soon as possible for the benefit of Ward. And the defendant denies that this accident was due to any rough handling of these cars or this train or any negligence on its part.

Now, the first question which you will be required to decide in this case is, Was the defendant negligent under the circumstances. Plaintiff claims that the servants or employes of the defendant, and particularly Rogers, the foreman, were negligent in the handling of that train and caused Ward's death.

If such negligence should be proven on the part of Rogers and the train crew, then, under the law, such negligence would be the negligence of this defendant railway company for which it would be liable if it was a case of liability. So the question narrows down to the question whether Rogers was negligent in giving or failing to

give the proper signals in the course of that movement. Did Rogers give the emergency stop signal before Ward was thrown from the top of the car? Or did he give it after Ward fell?

Plaintiff claims that this emergency stop signal was given and that the cars were handled in conformity to that signal and that Ward was thereby jerked or thrown from the car. Defendant denies that. You have heard the evidence upon this question.

This is one of the principal questions in the case. There is
197 a sharp controversy here, a sharp issue in the testimony in respect to what signal was given at that time and what the movement of the car was at that time. You have heard the testimony of these witnesses and it is for you to say what the facts are on that question, and it is for you to say under the evidence in this case whether it was customary and usual in operations of that kind for the foreman to signal to the men on top of the cars as to when and where the next cut was to be made. And it is for you to say whether in the usual and customary operations of that kind Rogers should have given the signal to this plaintiff's intestate indicating what car was to be cut off and when it was to be cut off of the train.

Now, the law required the defendant, in the operation of its yards and in the switching and distribution of its cars, to exercise ordinary care for the safety of its employees. That was the measure of legal duty which the law imposes upon this defendant.

Plaintiff says that the defendant is negligent because it failed to discharge that legal duty which it owed to Ward.

By ordinary care is meant such care as an ordinarily prudent and cautious man would have used under the same circumstances for the safety of his employees; and if the foreman, Rogers, working with Ward and the other members of the crew in the switching and distribution of these cars, did exercise ordinary care under the circumstances in this respect, then the defendant was not negligent, and the defendant would not be liable.

198 If, however, you should find that the defendant through any of its employees working with Ward in that crew failed to do anything that a reasonable man of ordinary prudence would have done under the circumstances for Ward's safety in handling and switching those cars, then such failure or omission would constitute negligence on the part of the defendant.

If you do not find from the evidence that the defendant was negligent, that, of course, would be an end of the case and your verdict would be for the defendant.

If, on the other hand, you should find that defendant was negligent as charged and that Ward was thereby injured or killed, then you would come to another question in the case; was Ward himself guilty of any negligence which contributed to cause his injuries? This is a matter of defense, and the burden of establishing this defense rests upon the defendant. In this case where the person injured is deceased at the time of the trial, in so far as not contradicted by direct evidence or rebuttal by facts and circumstances in the case, it is presumed that Ward exercised ordinary care for his own safety under all the circumstances, but this is a

presumption only and merely puts the burden upon defendant to produce some evidence, however slight, to overcome that presumption.

Now, under the law, Ward himself owed a duty to himself and to the defendant. It was his duty to also exercise ordinary care for his own safety under the circumstances. That is, he was required to do everything which a reasonable man of ordinary prudence would have done under the same circumstances for his own safety, and if the evidence shows that he failed in that respect, then he would be guilty of contributory negligence which would diminish the amount which he might otherwise recover in proportion as his contributory negligence caused his injuries.

It is also the law that when Ward as an employe of the defendant entered the railroad service which is dangerous or at best hazardous, knowing it to be such, he accepted the dangers and assumed the risks of the work in the way it is usually and customarily done in that yard, and he also assumed all the risks which in the prudent use of his senses should have been known to him as a reasonable man. And if Ward's death was the result of the usual or ordinary movements and methods of doing the work or one which should have been known to him as a reasonable man in the prudent exercise of his senses, then he could not recover in this case or his representative could not recover in this case.

If, on the other hand, Ward's death was the result of a mere accident to which the defendant did not contribute or was the result of a risk assumed by Ward, then, of course, there could be no recovery.

Now, Ward was a switchman riding on freight trains, in which there is more or less running in and out of slack and more or less sudden stopping and jerking of the cars, and as such he was required by the law to be prepared for such stopping, jerking and abrupt slacking of speed as is liable to result from the customary and usual way of handling and stopping of cars of that character under the circumstances appearing in this case. And if his injuries resulted from the jolts arising from the usual and customary movements of cars he could not recover. If, however, his injuries were the natural result of the jerking and stopping of cars due to the rough handling of the train in an unusual manner without the exercise of ordinary care on the part of the other servants of the defendant, then Ward did not assume that risk and if he was injured thereby, of course the defendant would be negligent.

If you do not find the defendant negligent, as I said before, that would end the case.

If you should find that the defendant was negligent, from the greater weight of the evidence, and that his injuries were not due to risks assumed by the plaintiff, then you would find that the plaintiff would be entitled to recover in some amount, and you would come to a further question in the case, and that is this: Did Ward's injuries kill him instantly. If he was killed instantly,

one rule of damages applies, while if he lived some time after he was injured, another rule of damages would apply. There is some evidence that he lived a few minutes after receiving his injuries; there is other evidence that he was dead when taken out from under the car. If you should find that Ward died from his injuries without living an appreciable length of time, then the plaintiff could only recover, if at all, what would have been the pecuniary value of Ward's life to his father and mother had he lived. In other words, what financial loss did Ward's

201 father and mother suffer by reason of his instantaneous death.

And in that connection it would be proper for you to consider his health, his disposition to contribute to the support of his parents, the evidence of what he customarily earned, his earning capacity, the amount that he was in the habit of giving to his parents, his age, his condition in life, the length of time he probably would have lived had not this accident happened, and the expectancy of the life of the father and mother, and the reasonable expectancy of the parents in respect to benefits, if any, from the services of their son; but you could not allow any damages for the grief or sorrow of the father or mother nor for their wounded feelings. You could allow nothing for the pain or suffering which Ward may have experienced before he died, you could only allow what the father and mother might reasonably have expected their son would have contributed to their support in case he had lived. In other words, the damages would be measured by the prospective value of their son's life to the parents in dollars and cents had he lived. In case you find that Ward did not die instantly from his injuries but that he lived some appreciable length of time after the accident, then you would come to another question in the case.

Under the law of the United States it is provided that any right of action given by the Act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit

202 of his parents, if there is no surviving widow and children. And if you should find from the evidence that Ward

did not die instantly from his injuries but that he lived some little time after he was injured, then, under the law, the plaintiff would be entitled to recover damages in the same amount that Ward, the deceased, would have been entitled to recover had he brought the action in his lifetime. That is, you can award such damages as in your judgment would be a full, fair and reasonable compensation for the loss sustained by Ward, the deceased, by reason of the injuries he received. But in this connection, you would not allow anything for his pain or suffering under the circumstances of this case. And in that connection, it would be proper for you to consider his age, his habits of industry, his health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss.

If you should find that the plaintiff was entitled to recover because of the negligence of the defendant, and if you should also find that the plaintiff himself was guilty of negligence contributing to cause his injuries, the amount of the plaintiff's recovery in this case would be reduced or diminished in proportion as the contributory negligence of Ward contributed to cause the injuries from which he died.

Now, under the law, you are the sole judges of the facts. By that is meant that it is for you to remember the evidence
203 as you have heard it from the witnesses, and decide the case upon the testimony. You are not to be influenced by any misstatements of the evidence made by either the Court or the counsel inadvertently upon the trial of the case.

The law makes you the judges of the credibility of the witnesses. By that it is meant that it is for you to say what witnesses are worthy of belief and to what extent you will believe the witnesses. It is your duty, as far as possible, to harmonize and reconcile the testimony of all the witnesses and to return a verdict upon the entire testimony in the case. If, after an earnest attempt to do that, you should believe that one or more of these witnesses has wilfully testified falsely in respect to the character of the signal which Rogers gave just before Ward fell, then, under the law, you would be entitled to entirely disregard the testimony of such witness or witnesses except in so far as they may be corroborated by other competent and credible testimony in the case. If after a careful consideration of the testimony, you should believe that any one or more of these witnesses has wilfully testified falsely, you would be entitled, as I have said, to disregard the testimony of such witness or witnesses except as they may be corroborated in the case.

Under the law of this state, after twelve hours' deliberation, in case you do not agree, ten or more of the jurors may return a verdict. The verdict, under those circumstances must be signed by the jurors who concur in the verdict, and the date and
204 hour at which they arrive at their verdict must be noted thereon. In case of a verdict by the entire jury, it will only be signed by the foreman.

Jury retires.

Stay of forty days entered.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

CAPITAL TRUST COMPANY, as Administrator of the Estate of
William M. Ward, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Verdict.

We, the jury in the above entitled action, find a verdict in favor of the plaintiff and assess its damages at the sum of \$4,462.50.

PETER S. WICK, *Foreman.*

Dated Jan. 16, 1914.

At the close of the court's charge to the jury, defendant duly expected to the following instructions:

"Did Ward's injuries kill him instantly? If he was killed instantly, one rule of damages applies, while if he lived some time after he was injured, another rule of damages would apply. There is some evidence that he lived a few minutes after receiving his injuries; there is other evidence that he was dead when taken out from under the car. If you should find that Ward died from his injuries without living an appreciable length of time, then the plaintiff could only recover, if at all, what would have been the pecuniary value of Ward's life to his father and mother had he lived."

Defendant further excepts to the charge of the court as follows:

"And in that connection it would be proper for you to consider his health, his disposition to contribute to the support of his parents, the evidence of what he customarily earned, his earning capacity, the amount he was in the habit of giving to his parents, his age, his condition in life, the length of time he probably would have lived had not this accident happened, and the expectancy of the life of the father and mother, and the reasonable expectancy of the parents in respect to benefits, if any, from the services of their son."

Defendant also excepts to the following portion of the Court's charge:

"In case you find that Ward did not die instantly from his injuries, but that he lived some appreciable length of time after the accident, then you would come to another question in the case.

"Under the law of the United States it is provided that any right of action given by the Act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit of his parents, if there is no surviving widow and children. And if you should find from the evidence that Ward did not die

instantly from his injuries, but that he lived some little time after he was injured, then under the law the plaintiff would be entitled to recover damages in the same amount that Ward, the deceased, would have been entitled to recover had he brought the action in his life time. That is, you can award such damages as in your judgment would be a full, fair and reasonable compensation for the loss sustained by Ward, the deceased, by reason of the injuries he received. * * *

206 for you to consider his age, his habits of industry, his health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss."

Defendant also excepts to the following charge of the Court:

"If, however, you should find that the defendant through any of its employes working with Ward in that crew failed to do anything that a reasonable man of ordinary prudence would have done under the circumstances for Ward's safety in handling and switching those cars, then such failure or omission would constitute negligence on the part of the defendant."

STATE OF MINNESOTA,

County of Ramsey:

District Court, Second Judicial District.

CAPITAL TRUST COMPANY, as Administrator of the Estate of
William M. Ward, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order Allowing Settled Case.

The foregoing official transcript of proceedings upon the trial, having been by me examined and found conformable to the truth and containing all the evidence, rulings, exceptions and proceedings had upon the trial of said action, same is hereby allowed as and for a settled case herein. Photographs and other exhibits introduced at the trial and referred to in the transcript are
207 hereby made a part of said settled case the same as if actually incorporated in said transcript.

OLIN B. LEWIS,
District Judge.

St. Paul, Minn., March 14, 1914.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

CAPITAL TRUST COMPANY, as Administrator of the Estate of
of William M. Ward, Deceased, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Motion.

To Samuel A. Anderson, Attorney for Plaintiff:

You will please take notice, that on Saturday, the 14th day of March, 1914, at the judge's chambers at the Court House in the City of St. Paul, Ramsey County, Minnesota, at ten o'clock A. M., or as soon thereafter as counsel can be heard, the defendant in this action will apply to the court, the Honorable Olin B. Lewis, Judge, for an order setting aside the verdict herein rendered in favor of the plaintiff and order judgment in favor of this defendant notwithstanding said verdict, which motion will be made upon a settled case and upon the files and records in this action, and which motion will be based on the following ground:

That upon all the evidence and law applicable thereto plaintiff is not entitled to recovery and has not proven the allegations of the complaint and has not established negligence or liability on the part of this defendant.

208 You will please take notice further: That in case the court should deny the foregoing motion, defendant at the same time and place will thereupon move said court for an order setting aside said verdict and granting a new trial of this case, which motion will be made upon a settled case and upon the files and records herein and upon the following grounds:

I.

That said verdict is not justified by the evidence.

II.

That said verdict is contrary to law.

III.

Errors of law occurring at the trial of said action, and duly excepted to, which said errors are as follows:

(a) The court erred in instructing the jury as follows:

"If, however, you should find that the defendant through any of its employes working with Ward in that crew failed to do anything that a reasonable man of ordinary prudence would have done under the circumstances for Ward's safety in handling and switching those cars, then such failure or omission would constitute negligence on the part of the defendant."

Due and personal service of the within is hereby admitted this 26th day of M'ch, 1914.

S. A. ANDERSON,
Att'y for Pl'ff.

Filed March 26, 1914. Matt Jensen, Clerk.

213 STATE OF MINNESOTA,
County of Ramsey, ss:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of appeal and waiver of Bond in the action therein entitled, now remaining of record in my office and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said Court, at St. Paul, this 27th day of March A. D. 1914.

[SEAL.]

MATT JENSEN, *Clerk*,
By G. P. RITT, *Deputy Clerk*.

(Endorsed:) Filed Mar. 30 1914. I. A. Caswell, Clerk.

214 STATE OF MINNESOTA:

In Supreme Court, October Term, 1914.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignments of Error.

I.

The court erred in denying defendant's motion for judgment notwithstanding the verdict.

II.

The court erred in denying defendant's motion for a new trial made upon the ground that the verdict was not justified by the evidence and was contrary to law.

III.

The court erred in instructing the jury as follows:

"Did Ward's injuries kill him instantly? If he was killed instantly, one rule of damages applies, while if he lived some time

after he was injured, another rule of damages would apply. There is some evidence that he lived a few minutes after receiving his injuries; there is other evidence that he was dead when taken out from under the car."

J.

The court erred in instructing the jury as follows:

"In case you find that Ward did not die instantly from his injuries, but that he lived some appreciable length of time
215 after the accident, then you would come to another question in the case.

Under the law of the United States it is provided that any right of action given by the Act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit of his parents, if there is no surviving widow and children. And if you should find from the evidence that Ward did not die instantly from his injuries but that he lived some little time after he was injured, then, under the law, the plaintiff would be entitled to recover damages in the same amount that Ward, the deceased, would have been entitled to recover had he brought the action in his lifetime. That is, you can award such damages as in your judgment would be a full, fair and reasonable compensation for the loss sustained by Ward, the deceased, by reason of the injuries he received. But in this connection, you would not allow anything for his pain or suffering under the circumstances of this case. And in that connection, it would be proper for you to consider his age, his habits of industry, his health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss."

V.

The court erred in submitting as a question of fact for the jury to determine whether or not, Ward, plaintiff's intestate, was instantly killed.

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VI.

The court erred in denying defendant's motion for new trial made upon the ground that the verdict awarded excessive damages, appearing to have been given under the influence of passion and prejudice.

VII.

The court erred in assuming in its instruction that if plaintiff's intestate, Ward, was not instantly killed, but did not regain consciousness, that a right of action would survive to the personal representatives of the deceased, under the Federal Employers' Liability Act.

VIII.

The court erred in instructing the jury that a cause of action survived to the personal representatives of the deceased under the Federal Employers' Liability Act if he lived some appreciable length of time after the accident.

M. L. COUNTRYMAN AND

A. L. JANES,

Attorneys for Appellant.

203 Great Northern Building, St. Paul, Minnesota.

(Endorsed:) Filed Sep. 3 1914. I. A. Caswell, Clerk.

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18776

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 250.

CAPITAL TRUST COMPANY, Adm'r, Respondent,

v.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Syllabus.

The testimony of a witness which concededly made defendant's negligence a question for the jury, in this a personal injury action, was not so discredited by prior written statements and reports, and by his cross-examination, that a verdict based thereon, and approved by the trial court, should not stand. The jury have a right to consider the circumstances under which such statements are made.

When a person lives an appreciable length of time after receiving an injury through a defendant's negligence, even though in a state of unconsciousness, his cause of action survives under sect. 9 of the Federal Employers' Liability Act (amendment of 1910). Testimony that plaintiff's intestate after the injury moaned and breathed for ten minutes justified the court in submitting the question of the survival of his cause of action to the jury.

The damages recovered held not excessive since the jury might have found that his death was not instantaneous.

Order affirmed.

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18776.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 250.

CAPITAL TRUST COMPANY, Adm'r, Respondent,

v.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Opinion.

While working for defendant, a carrier of interstate commerce, Wm. A. Ward, a switchman, was killed. The administrator of his estate brought this action under the Federal Employers' Liability Act to recover damages, the claim being that Ward's injuries and death resulted from defendant's negligence. Plaintiff received a verdict, and defendant appeals from the order denying its alternative motion for judgment or a new trial.

Appellant claims that the testimony establishing its negligence is so discredited that a verdict based thereon should not be permitted to stand; that the proof of instantaneous death was conclusive, and hence the court erred in submitting the question of the survival of Ward's cause of action to the jury which, if found true, permitted the damages to be measured by the loss of Ward's earning capacity and not by the pecuniary loss to his beneficiaries; and that the damages are excessive.

The circumstances attending the fatality are in brief these: Ward, an experienced switchman, was engaged, under a foreman, one Rogers, and crew, in distributing a string of fourteen cars, in an extensive switchyard in Minneapolis. The cars were to be "kicked" from the lead track and switched onto the proper yard tracks. In the operation the locomotive was in the rear pushing the cars west, and it was necessary to speed up sufficiently so that when a car from the forward end was uncoupled the momentum would be sufficient to carry it beyond the intended switch to its destination, the remaining cars would be stopped before reaching the switch, or else the switch would be set against them. If the car, or cars, to be "kicked" were loaded, it was the duty of one of the switchmen to get to the brakes so as to stop at the right place. Rogers was on the ground directing, through signals, the movements of the train and, to some extent, the work of the crew. One man, called the pin puller, uncoupled the car or cars to be "kicked" at the proper time and place, and another attended the switch. As stated the cars were being pushed west in obedience to Rogers' signal to "kick" the forward car, an empty box car. At the time, Ward was observed standing on the running board at the middle of the next box car (one witness states it might have been on the third

from the first), looking toward Rogers. A few seconds thereafter he was seen falling over the forward end of the second car, the first car just prior to that moment, having been uncoupled, had moved away several feet from the balance of the cars which were being slowed down, or abruptly checked, as claimed by plaintiff. He was run over and died, if not immediately, within ten minutes.

The negligence claimed was high speed, and the giving of the slow down signal by Rogers so quickly after the uncoupling that Ward, who understood his duty to be to get onto the uncoupled car and ride it to its destination, did not have time to reach it from where he was standing before the cars parted also that when Rogers had given the cut off signal, he signalled the engineer for a quick check of speed, so that the car on which Ward was walking, or standing, was stopped so abruptly and violently as to throw Ward over the end. Counsel for defendant frankly concedes that a case for the jury upon defendant's negligence is made by the testimony of Holden, the switchman who was standing on the ground near Rogers, and who, upon observing the signals and the probability that Ward would not be able to get on the "kicked" car, rushed forward and boarded it in such hurry as almost to throw the pin puller. But it is said, Holden's story is so discredited by his written statements of the occurrences made soon thereafter to defendant and its claim agent, and by his cross-examination, that the verdict should not be permitted to stand. No witness observed Ward the few minutes elapsing between the time the car was uncoupled and when he was seen pitching over the end of the car on which he had been riding. Defendant contends that since the switchman, McDonough, testified that he told Ward that the car then "kicked" was an empty and that the foreman had instructed the crew that empties "kicked" need not be ridden to destination, it is conclusively established that Ward knew or ought to have known that he had no business to try to get on that car. But the acts of the men then present testify to the contrary. Ward evidently considered it his duty to make that car, otherwise he would have remained at the middle and could not possibly have been pitched over the end however sudden the check. When

Holden observed the signals of Rogers he evidently thought it some one's duty to board the car, for he did, and there is no evidence that either Rogers or McDonough then attempted to call him back, Ward is dead and cannot speak. Rogers the person who gave the signals and saw Ward's position was not produced as a witness. Defendant sought to account for his absence but the jury were not bound to find that such diligence in securing his attendance was shown that no inferences favorable to plaintiff's theory of the case should be drawn as to the facts within Rogers' knowledge. As to the claim that the written statements of Holden above referred to, and his cross-examination, wholly discredit his testimony, we observe that the only part in the written statement tending in that direction is to be found in this language "the accident was not due to any rough handling as these cars were switched the same as all others." We think a jury is justified in taking

into consideration the circumstances usually surrounding reports and statements of accidents made by an employe to an employer or his claim agent. There may be reasons, that appear good to the servant at the time, why the giving of full details should be unnecessary. Some, because of an aversion to appear as a witness if a suit results, may make as noncommittal report as possible. Others may omit an important detail, thinking its legal bearing trivial. Again, a servant's desire to retain his place may be sufficiently persuasive to him to induce only a partial disclosure of his knowledge, if he thinks himself or a foreman or fellow-servant at all to blame. And, unless compelled by the authority or the law, many persons would hesitate to make written statements which charge any fellow-being with having been, even remotely, the cause of the death of another. May not also the statement when made in response

222 to a claim agent's questions be somewhat directed, shaded or circumscribed by the questions and the secret purpose of the questioner? We think Holden's veracity was for the jury. There was no inherent improbability in his testimony, nor was it controverted by conceded physical facts.

Ward's injuries were received subsequent to the amendment of 1910 of the Federal Employers' Liability Act, and we do not understand that defendant challenges the correctness of the instructions of the court as to the proper damages in case Ward's cause of action survived. There being no conscious suffering nor any expenses, for medical attendance, the court limited the recovery, in case he was not instantly killed, to the lost earning capacity. There was testimony that Ward, though unconscious, lived some moments after being removed from the train. The court instructed the jury that if they found that he lived an appreciable length of time after the injury his cause of action survived. The defendant contends that, since Ward "never regained consciousness and had no conscious period of suffering, there is no reason why the action should survive;" and that "the theory of a survival of an action is that there was a period of time during which the deceased could have brought an action in his own behalf." By that, we assume, it is meant, that there should have been a physical possibility to begin an action in his behalf before his death. The authorities cited do not support the contention. In *Kearney v. Boston & Worcester Ry. Co.* 9 Cush. 108 a cause of action was held not to survive where "it is in evidence, that there was only a momentary, spasmodic struggle, and the death instantaneous." In the later case of *Hollenbeck v. Berkshire Ry.*

Co. 9 Cush. 478, Chief Justice Shaw says "the accruing of
223 the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer." Chief Justice Bigelow in *Bancroft v. Boston & Worcester Ry. Co.* 11 Allen 34 says: "The continuance of life after the accident, and not insensibility and want of consciousness, is the test by which to determine whether a cause of action survives." "If the intestate lived after he was struck, though the time might be brief, the cause of action survived," *Tully v. Fitchburg Railroad*, 134 Mass. 499. To the same effect is *St. Louis etc. Ry. Co. v. Dawson*, 68 Ark.

11, *Beeler v. Butte etc. Co.*, 41 Mont., 465; *Kellow v. Central Io. Ry. Co.*, 68 Io. 470; *Oliver v. Street Ry. Co.* 134 Mich. 367; *Ely v. Detroit United Ry. Co.* 162 Mich. 287. The case of *Dillon v. Great Northern Ry. Co.* 38 Mont. 485 is not in point for there was a stipulation that death was instantaneous. In the case of *Kellow v. Central Io. Ry. Co.* supra the jury answered in the affirmative the question: "Was the death of the deceased of that nature commonly known as instant death?" Nevertheless the court held that such finding did not determine that a cause of action did not accrue to him before his death. The deceased was on a railroad train that was wrecked; when found in the wreck he breathed, but died before he could be removed. The court said: "If he survived the injury but for a single moment, the cause of action accrued to him as certainly as it would have done if he had lived for a month or a year thereafter." One of defendant's witnesses testified that Ward breathed when taken from under the car, Holden's testimony was that when he reached Ward after returning from riding the "kicked" car into the yard, which consumed about five minutes, he moaned and continued to breathe and live from three to five minutes longer.

224 We think the testimony made the survival of Ward's cause of action a jury question.

If the jury found, that Ward lived an appreciable length of time after the injury, and we conclude the evidence so warrants, it cannot be said that the damages are excessive.

Order affirmed.

HOLT, J.

(Endorsed:) Opinion and Syllabus. Filed October 9, 1914. I. A. Caswell, Clerk.

225 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1914.

Friday morning, 9:30 o'clock, September 25, A. D. 1914, Court convened pursuant to adjournment.

Reg. No. 18776; Cal. No. 250.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased, Respondent,

VS.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

I. A. CASWELL, Clerk.

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.]

I. A. CASWELL, *Clerk.*

By ———, *Deputy.*

(Endorsed:) Filed Oct. 21, 1914. I. A. Caswell, Clerk.

226 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 250.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General April Term of this court A. D. 1914, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the Court below, herein appealed from, be and the same hereby is, in all things affirmed, and that judgment be entered accordingly.

Entered October 21, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.]

I. A. CASWELL, *Clerk.*

(Endorsed:) Filed Oct. 21, 1914. I. A. Caswell, Clerk.

227 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1914.

No. 250.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Respondent,

VS.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause
October 21, A. D. 1914It is *and* hereby determined and adjudged that the order of the
Court below, herein appealed from, to wit, of the District Court of
the Second Judicial District, sitting within and for the County of
Ramsey, be and the same hereby is in all things affirmed.

Dated and signed October 21, A. D. 1914.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

228 STATE OF MINNESOTA,

*Supreme Court, ss:*I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify
that the foregoing is a full and true copy of the Entry of Judgment
in the cause therein entitled, as appears from the original remain-
ing of record in my office; that I have carefully compared the within
copy with said original and that the same is a correct transcript there-
from.Witness my hand and seal of said Supreme Court at the Capitol,
in the City of St. Paul, October 21, A. D. 1914.

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.]

I. A. CASWELL, *Clerk.*[Endorsed:] State of Minnesota, Supreme Court. Transcript of
Judgment. Filed October 21, A. D. 1914. I. A. Caswell, Clerk.229 No. 18776. State of Minnesota, Supreme Court. Capital
Trust Company as administrator of the estate of William M.
Ward, deceased, respondent, against Great Northern Railway Com-
pany, appellant. Judgment Roll. Filed October 21, 1914. I. A.
Caswell, clerk.

230 STATE OF MINNESOTA,
Supreme Court, ss:

Mandate.

The State of Minnesota to the Hon. Judge and officers of the District Court of the Second Judicial District, sitting within and for the County of Ramsey, Greeting:

Whereas, Lately in your Court, in an action therein pending, between Capital Trust Company, as administrator of the estate of William M. Ward, deceased, plaintiff and Great Northern Railway Company Defendant a certain order was entered therein July 24, 1914, from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The same was duly argued, heard and submitted; and after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and order "That the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and that judgment be entered accordingly." A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, Therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, The Hon. Calvin L. Brown, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this 21st day of October, 1914.

[Seal of the Supreme Court, State of Minnesota.]

[SEAL.]

I. A. CASWELL,
Clerk of the Supreme Court,
By ———, *Deputy.*

(Endorsed:) Filed October 21, 1914. Matt Jensen, Clerk.

231 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

No. 111,514.

CAPITAL TRUST CO., as Administrator of the Estate of Wm. M.
Ward, Deceased, Plaintiff,
against
GREAT NORTHERN RAILWAY Co., Defendant.

Pursuant to the verdict of the Jury duly rendered and filed in the above entitled action on the 16th day of January A. D. 1914.

Now, on motion of S. A. Anderson said Attorney, it is hereby adjudged that the plaintiff herein recover of said Defendant Great Northern Railway Co. the sum of Forty six hundred sixty five and 50/100 Dollars damages, with Seventeen and 20/100 Dollars cost and disbursements, in all amounting to \$4682.70.

Signed this 21st day of October A. D. 1914.

MATT JENSEN, Clerk,
By G. A. JOHNSON,
Deputy Clerk.

(Endorsed:) Judgment Roll. Filed 21 day of October A. D. 1914. Matt. Jensen, Clerk. By G. A. Johnson, Deputy Clerk S. A. Anderson, Plaintiff's Attorney.

232 STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

You will please take notice that the Great Northern Railway Company, defendant in the above entitled action, appeals to the supreme court of the State of Minnesota from the judgment of this court entered and docketed in said action on the 21st day of October, 1914, in favor of plaintiff and against defendant in the sum of four thousand six hundred eighty-two and 70/100 Dollars (\$4682.70); and from the whole thereof.

Dated this 22nd day of October 1914.

M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Defendant, Great
Northern Railway Company.

203 Great Northern Building, St. Paul, Minnesota.

To Messrs. Samuel A. Anderson and A. F. Storey, attorneys for plaintiff, and Matt Jensen, Esq., clerk of the District Court.

Bond on appeal is hereby waived, and it is hereby stipulated that all proceedings in the above entitled action shall be stayed until the final determination of the appeal.

Dated October 22, 1914.

S. A. ANDERSON,
A. F. STOREY,
Attorneys for Plaintiff.

Due and personal service of the within is hereby admitted this 22 day of October 1914.

S. A. ANDERSON AND
A. F. STOREY,
Attorneys for Plaintiff.

(Endorsed:) Filed Oct. 23 1914. Matt Jensen, Clerk, by G. P. Ritt, Deputy.

233 STATE OF MINNESOTA,
County of Ramsey:

Second Judicial District.

I, Matt Jensen, Clerk of the District Court, Ramsey County, and State of Minnesota, do hereby certify and return to the Honorable the Supreme Court of said State, that I have compared the foregoing paper writing with the original Notice of Appeal, waiver of Bond and Stipulation in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at St. Paul, this 23rd day of October, A. D. 1914.

[SEAL.]

MATT JENSEN, *Clerk,*
By G. P. RITT, *Deputy Clerk.*

(Endorsed:) Filed Oct. 24, 1914. I. A. Caswell, Clerk.

234 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Whereas, the above entitled action was duly tried and a verdict by the jury rendered in the District Court of Ramsey County, Minnesota, against the defendant and in favor of the plaintiff,

And whereas, the defendant's alternative motion for a new trial or for judgment notwithstanding the verdict was duly presented and denied in said court,

And whereas, an appeal from said order was taken to this Court,
And whereas, this Court duly considered the same and affirmed
the order of the trial court,

And whereas, the plaintiff did thereafter cause judgment to be
entered in his favor and against the defendant in the sum of
\$4682.70, which judgment was made and entered on the 21st day
of October, 1914,

And whereas, the defendant did immediately thereafter take an
appeal from said judgment to this Court,

And whereas, no questions are involved on said second appeal
different from those involved on the first appeal,

Now therefore, it is agreed and stipulated by and between the
parties respectively, through their respective attorneys, that said
appeal from said judgment may be submitted to this court
235 forthwith upon the same printed record and same briefs
presented on the first appeal and without argument.

Dated January 7, 1915.

SAMUEL A. ANDERSON,
Attorneys for Respondent.
M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Appellant.

(Endorsed:) Filed Jan. 29, 1915. I. A. Caswell, Clerk.

236 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

19122.

CAPITAL TRUST COMPANY, as Administrator, Respondent,
VS.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Per Curiam:

This appeal from the judgment having been, by stipulation of
the parties, submitted upon the same printed record and briefs upon
which the appeal from the order denying defendant's motion for
judgment notwithstanding the verdict or for a new trial was heard
and determined, the judgment is affirmed.

(Endorsed:) Filed February 5, 1915. I. A. Caswell, Clerk.

237 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

It is hereby agreed and stipulated by and between the parties hereto, through their attorneys, respectively, that the attached bill of costs and disbursements on the appeal from the judgment, and the amount of the judgment entered in the District Court, with interest, are true and correct, and that the Clerk may forthwith tax the same and enter judgment for the whole thereof.

(Signed)

SAMUEL A. ANDERSON,

A. F. STOREY,

Attorneys for Respondent,

M. L. COUNTRYMAN,

A. L. JAMES,

Attorneys for Appellant.

238 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Dec-ased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Judgment, District Court entered October 21, 1914..... \$4,682.70
Interest thereon to March 8, 1915..... 105.07

Costs and disbursements on appeal from judgment:

Statutory costs 25.00
Clerk's fees 5.00

Total \$4,817.77

(Endorsed:) Filed Mar. 10, 1915. I. A. Caswell, Clerk.

239 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 19122.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Respondent,

VS.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause March 10, A. D. 1915, it is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Second Judicial District, sitting within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Four Thousand Eight Hundred Seventeen and 77/100 Dollars, (\$4817.77) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 10, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.**Statement for Judgment.*

Statutory costs \$25.00. Printer \$— Clerk \$5.00. Acknowledgments \$—. Return \$—. Postage and Express \$—. Filing Mandate \$—.

Judgment, District Court entered October 21, 1914, \$4,682.70.

Interest thereon to March 8, 1915, \$105.07.

Total \$4,817.77.

240 STATE OF MINNESOTA,

Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, March 10, A. D. 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of Judgment.
Filed March 10, A. D. 1915. I. A. Caswell, Clerk.

241 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 19122.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Appeal from District Court, Second Judicial District, County
of Ramsey.

This cause having been duly argued and submitted at the General
October Term of this Court A. D. 1914 upon the return to the appeal
herein,

Now, after full and mature deliberation had thereon, it is here
and hereby ordered that the judgment of the Court below, herein
appealed from, be and the same hereby is, in all things affirmed and
that judgment be entered accordingly.

Entered March 10, A. D. 1915.

By the Court.

Attest:

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the
original Order for judgment entered in the above entitled cause.

Attest:

[SEAL.]

I. A. CASWELL, *Clerk.*

(Endorsed:) Filed Mar. 10, 1915. I. A. Caswell, Clerk.

242 STATE OF MINNESOTA:

Supreme Court.

19122.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Judgment Roll.

(Endorsed:) Filed March 10, 1915. I. A. Caswell, Clerk.

Authentication of Record.

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Capital Trust Company, as administrator of the estate of William M. Ward, deceased, Respondent, vs. Great Northern Railway Company, Appellant, and also of the assignments of error to said court and the opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office at St. Paul, Minnesota, this 16th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Defendant in Error.

Assignments of Error.

Comes now the Great Northern Railway Company, plaintiff in error, in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Minnesota erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

The said Supreme Court erred in affirming the judgment entered in the District Court in favor of the plaintiff in error.

II.

The said Supreme Court erred in holding that under the Federal Employers' Liability Act (Section 9, Federal Employers' Liability Act, Amendment 1910) an action survives to the personal representatives of the deceased if death is not instantaneous, even though the deceased did not regain consciousness.

III.

The said Supreme Court erred in holding that defendant in error, under the Federal Employers' Liability Act, was entitled

to damages for the lost earning capacity of deceased, where deceased after the accident did not regain consciousness and lived but five minutes.

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IV.

The said Supreme Court erred in holding that it was a question of fact for the jury under the Federal Employers' Liability Act whether or not deceased's cause of action survived when it appeared that the deceased did not regain consciousness and life was extinct within a few minutes after the accident.

V.

The said Supreme Court erred in holding in substance that even though the defendant in error in his complaint sought to recover damages solely under Section 9 of the Federal Employers' Liability Act, Amendment 1910, and the evidence established instant death and no survivorship, damages might still be assessed under Section 1 of the Federal Employers' Liability Act.

Wherefore, for these and other manifest errors appearing in the record, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error granting it its rights under the statutes of the United States, and plaintiff in error also prays for judgment for its costs.

E. C. LINDLEY,
*Attorney for Great Northern Railway
Company, Plaintiff in Error.*

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

[Endorsed:] 19122. In the Supreme Court of the United States. Great Northern Railway Co., Plaintiff in Error, vs. Capital Trust Company, as Adm'r of the Est. of Wm. M. Ward, deceased, Defendant in Error. Assignments of Error. Filed Mar. 10, 1915. I. A. Caswell, Clerk.

246 In the Supreme Court of the State of Minnesota.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William
M. Ward, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Petition for a Writ of Error.

To the Honorable Justices of the Supreme Court of the State of Minnesota:

Your Petitioner, the above named Great Northern Railway Company, respectfully shows that on the 10th day of March 1915, the

Supreme Court of the State of Minnesota rendered a final judgment against your Petitioner in a certain case wherein your Petitioner was defendant, and Capital Trust Company, as administrator of the estate of William M. Ward, deceased, was plaintiff, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of law or equity in said state in which a decision in said suit could be had; that by the said suit there was drawn in question the construction of certain statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in commerce between any of the several states or territories, and the decision of this court is against the right claimed by the said Great Northern Railway Company, Appellant, and as it believes, contrary to the statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in interstate commerce, and against the right of the said Great Northern Railway Company thereunder, all of which will more fully appear in detail from the assignments of error filed herein.

247 Wherefore, the said Great Northern Railway Company prays that a writ of error may issue to the Supreme Court of the State of Minnesota for the correcting of the error complained of, and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court.

GREAT NORTHERN RAILWAY COMPANY,

By E. C. LINDLEY, *Attorney for Respondent.*

M. L. COUNTRYMAN,

A. L. JANES,

Of Counsel.

248 In the Supreme Court of the State of Minnesota.

CAPITAL TRUST COMPANY, as Administrator of the Estate of William M. Ward, Deceased, Respondent,

VS.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Order Allowing Writ of Error.

Comes now the Great Northern Railway Company, the Appellant above named, on this 10th day of March, 1915, and files and presents to this Court its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the question herein presented.

It is ordered by this court that a writ of error be allowed as prayed, provided, however, that the said Great Northern Railway

Company, Appellant, give bond according to law in the sum of Five Thousand Five Hundred Dollars (\$5,500.00), which bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 10th day of March, 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court
of the State of Minnesota.

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Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had in the said suit between Capital Trust Company, as administrator of the estate of William M. Ward, deceased, Plaintiff and respondent, and the Great Northern Railway Company, Defendant and Appellant, wherein, was drawn in question the construction of a clause of the constitution or statute of the United States, and the decision was against the right or privilege specially set up or claimed under the said clause of the constitution or statute, a manifest error hath happened, to the great damage of the said Great Northern Railway Company as by its complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this return, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States this 12th day of March, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

250 Done in the City of St. Paul, County of Ramsey, State of Minnesota, with the seal of the District Court of the United States for the District of Minnesota attached.

[Seal U. S. District Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States
for the District of Minnesota.

Allowed by:

CALVIN L. BROWN,
Chief Justice of the Supreme Court
of the State of Minnesota.

[Endorsed:] 19122. In the Supreme Court of the State of Minnesota. Capital Trust Company, as Adm'r of the Estate of William M. Ward, deceased, Respondent, vs. Great Northern Railway Company, Appellant. Petition for a Writ of Error. Order Allowing Writ of Error. Writ of Error. Filed Mar. 15, 1915. I. A. Caswell, Clerk.

251 Know all men by these presents, that we, Great Northern Railway Company, a corporation organized and existing under the laws of the state of Minnesota, as principal, and National Surety Company, a corporation of the state of New York, as surety, are held and firmly bound unto Capital Trust Company, as administrator of the estate of William M. Ward, deceased, in the sum of Five Thousand Five Hundred Dollars (\$5,500.00) to be paid to the said obligee, its heirs, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of March, 1915.

Whereas, lately in the Supreme Court of the State of Minnesota in a suit pending in said Court wherein Capital Trust Company, as administrator of the estate of William M. Ward, deceased, was respondent and Great Northern Railway Company was appellant, judgment was entered against the said appellant, and said appellant seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the said suit,

Now therefore, the condition of this obligation is such that if the above named appellant, Great Northern Railway Company, shall prosecute its said writ of error to effect and pay all costs and damages, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY
COMPANY,

By R. A. JACKSON, *Vice-President.*

[CORPORATE SEAL.]

Attest:

L. E. KATZENBACH,

Secretary.

NATIONAL SURETY COMPANY,
By W. C. McCURDY,

Its Attorney in Fact.

[CORPORATE SEAL.]

LEWIS D. NEWMAN.

H. E. MILLER.

G. E. JOHNSON.

EVAR CEDARLEAF.

252 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 10th day of March, 1915, before me appeared R. A. Jackson, to me personally known, who, being by me duly sworn, did say that he is the Vice President of the Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed on behalf of said corporation by authority of its Board of Directors; and said R. A. Jackson acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] FRANCES M. BARRETT,
Notary Public in and for the State
of Minnesota, County of Ramsey.

My commission expires April 20 1919.

253 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 10th day of March, 1915, before me appeared W. S. McCurdy, to me personally known, who, being by me duly sworn, did say that he is the Attorney in Fact of the National Surety Company; that the seal affixed to the foregoing instrument is the corporate seal of aforesaid corporation, and that said instrument was executed on behalf of said corporation, and that said instrument was executed on behalf of said corporation by authority of its board of directors, and said W. S. McCurdy acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] EVAR CEDARLEAF,
Notary Public in and for the State
of Minnesota, County of Ramsey.

My commission expires June 2nd 1920.

The within bond is this 10th day of March, 1915, approved.

CALVIN L. BROWN,
Chief Justice of the Supreme Court
of the State of Minnesota.

[Endorsed:] In the Supreme Court of the United States. Great Northern Railway Co., Plaintiff in Error, vs. Capital Trust Company, as Admr. of the Est. of Wm. M. Ward, deceased, Defendant in Error. Bond. (Endorsed:) Filed Mar. 10, 1915. I. A. Caswell, Clerk.

254 Certificate of Lodgment.

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 10th day of March, 1915, in the case of Capital Trust Company, as administrator of the

estate of William M. Ward, deceased, vs. Great Northern Railway Company, Appellant:

1. The original bond, of which a copy is herein set forth;
2. Copies of writ of error, as herein set forth—one for defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in St. Paul, Minnesota, this 16th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

255

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Capital Trust Company, as administrator of the estate of William M. Ward, deceased, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota, wherein the Great Northern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, of any there be, why the judgment rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota this 10th day of March, 1915.

CALVIN L. BROWN,
*Chief Justice of the Supreme Court
of the State of Minnesota.*

We, the undersigned attorneys of record for Capital Trust Company, as administrator of the estate of William M. Ward, deceased, Defendant in Error in the above entitled case, hereby acknowledge due service of the above citation.

SAMUEL A. ANDERSON.
A. F. STOREY.

[Endorsed:] In the Supreme Court of the United States. Great Northern Railway Co., Plaintiff in Error, vs. Capital Trust Company, as Admr. of the Est. of Wm. M. Ward, Deceased, Defendant in Error. Citation. Filed Mar. 17, 1915. I. A. Caswell, Clerk.

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Certificate of Return.

UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Minnesota, in the city of St. Paul, Minnesota, this 16th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of transcript \$64.50, paid by Great Northern Railway Company.

Endorsed on cover: File No. 24,607. Minnesota Supreme Court. Term No. 430. Great Northern Railway Company, plaintiff in error, vs. Capital Trust Company, as administrator of the estate of William M. Ward, deceased. Filed April 10th, 1915. File No. 24,667.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 430.

GREAT NORTHERN RAILWAY COMPANY,

Plaintiff in Error,

VS.

**CAPITAL TRUST COMPANY, as Administrator of the Estate
of WILLIAM M. WARD, Deceased,**

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT FOR PLAINTIFF IN ERROR.

This writ of error brings up for review by this court a judgment of the Supreme Court of the State of Minnesota affirming the judgment of the District Court of Ramsey County, Minnesota, in the sum of \$4,817.77, entered on a verdict in favor of defendant in error.

STATEMENT OF FACTS.

This is an action under the Employers' Liability Act of April 22, 1908, 35 Stat. 65, c. 149, and the amendment of April 5, 1910, 36 Stat. 291, c. 143, brought by an administrator to recover damages for injuries to and the death of his intestate. The action was for the benefit of the father and mother, there being no surviving widow or child. The damages sought to be recovered were (a) for the pecuniary loss to the father and mother by reason of the death; (b) for damages on the theory that the cause of action survived within the meaning of said amendment.

This appeal involves solely the question of the application of the proper rule of damages.

The deceased did not regain consciousness after the injury. The testimony was disputed as to whether or not he was instantly killed or lived in an unconscious condition for some few moments after the accident. See opinion of Supreme Court of Minnesota in *Capital Trust Company v. Great Northern Ry. Co.*, 127 Minn. 144, 148.

In submitting the question of damages to the jury the court submitted the question on two different theories:

- (a) If deceased was instantly killed, one rule of damages would apply, and
- (b) If deceased was not instantly killed, although he did not regain consciousness, a different rule of damages would apply.

(a) *If deceased was instantly killed.* The court instructed the jury as follows:

"If you should find that Ward died from his injuries without living an appreciable length of time, then the

plaintiff could only recover, if at all, what would have been the pecuniary value of Ward's life to his father and mother had he lived. In other words, what financial loss did Ward's father and mother suffer by reason of his instantaneous death. And in that connection it would be proper for you to consider his health, his disposition to contribute to the support of his parents, the evidence of what he customarily earned, his earning capacity, the amount that he was in the habit of giving to his parents, his age, his condition in life, the length of time he probably would have lived had not this accident happened, and the expectancy of the life of the father and mother, and the reasonable expectancy of the parents in respect to benefits, if any, from the services of their son; but you could not allow any damages for the grief or sorrow of the father or mother nor for their wounded feelings. You could allow nothing for the pain or suffering which Ward may have experienced before he died, you could only allow what the father and mother might reasonably have expected their son would have contributed to their support in case he had lived. In other words, the damages would be measured by the prospective value of their son's life to the parents in dollars and cents had he lived."

(b) *If deceased was not instantly killed and lived for an appreciable length of time, but did not regain consciousness.* The court instructed the jury as follows:

"Under the law of the United States it is provided that any right of action given by the Act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit of the parents, if there is no surviving widow and children. And if you should find from the evidence that Ward did not die instantly from his injuries but that he lived some little time after he was injured, then, under the law, the plaintiff would be entitled to recover damages in the same amount that Ward, the deceased, would have been entitled to recover had he brought the action in his lifetime. That is, you can award such damages as in your judgment would be a full, fair and reasonable compensation for

the loss sustained by Ward, the deceased, by reason of the injuries he received. But in this connection, you would not allow anything for his pain or suffering under the circumstances of this case. And in that connection it would be proper for you to consider his age, his habits of industry, his health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss."

The charge of the court on the question of damages was properly excepted to.

ASSIGNMENTS OF ERROR.

I.

The Supreme Court of the State of Minnesota erred in affirming the judgment entered in the District Court in favor of the plaintiff in error.

II.

The said Supreme Court erred in holding that under the Federal Employers' Liability Act (Section 9, Federal Employers' Liability Act, Amendment of 1910) a cause of action survives to the personal representatives of the deceased if death is not instantaneous, even though the deceased did not regain consciousness.

III.

The said Supreme Court erred in holding that defendant in error, under the Federal Employers' Liability Act, was entitled to damages based on the lost earning capacity of deceased, where deceased after the accident did not regain consciousness and lived but a few minutes.

IV.

The said Supreme Court erred in holding that it was a question of fact for the jury under the Federal Employers' Liability Act whether or not deceased's cause of action survived when it appeared that the deceased did not regain consciousness and life was extinct within a few minutes after the accident.

V.

The said Supreme Court erred in holding in substance that even though the defendant in error in his complaint sought to recover damages solely under Section 9 of the Federal Employers' Liability Act, Amendment of 1910, and the evidence established instant death and no survivorship, damages might still be assessed under Section 1 of the Federal Employers' Liability Act.

ARGUMENT.

ASSIGNMENTS OF ERROR NUMBERED I, II, III, IV AND V ARE HERE DISCUSSED TOGETHER.

There was testimony in this case that Ward, the deceased, though unconscious, lived some moments after the accident. The trial court instructed the jury that if deceased was instantly killed the damages should be limited to the pecuniary loss of the father and mother. The court further instructed the jury that if they found from the evidence that deceased was not instantly killed, though he did not regain consciousness, the damages awarded should be based upon what the deceased, Ward, *could have recovered had he brought the action in his lifetime*; that in arriving at such damages they should take into consideration his expectancy of life and the amount he would have earned during his lifetime, based upon his earning capacity.

The trial court was clearly incorrect in holding that where deceased did not regain consciousness, even though he was not instantly killed, damages should be based upon what deceased might have recovered had he brought the action in his lifetime. This question has been settled by this court since this appeal was taken, in the case of *St. Louis, Iron Mountain & Southern Railway Company vs. Craft*, 237 U. S. 648, 658 (59 L. ed. 1160). This court there held that the damages must be limited "for the loss and suffering of the injured person while he lived." The court said, referring to the survivorship action:

"On the contrary, it means that the right existing in the injured person at his death—a right covering

his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and Sec. 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."

It is therefore apparent that the trial court erred in assuming, even though the cause of action might have survived, under the state of facts in this case, that the personal representatives of deceased were entitled to damages based upon what the deceased might have recovered had he brought the action in his lifetime. The damages, under the facts in this case, should have been limited to the actual pecuniary loss of the beneficiaries, the mother and father.

A cause of action did not arise in favor of the deceased. He never regained consciousness, and cannot be said to have lived at all, after the accident. The trial court instructed the jury that even though they should find that the deceased was not instantly killed, no recovery could be allowed for pain and suffering, and as the deceased died

within a few minutes after the accident, it is apparent that there would be no other element of damages recoverable by the personal representative on the theory that the deceased's cause of action survived. However, we submit that under the decision of this court in the case of *St. Louis, Iron Mountain & Southern Railway Company vs. Craft*, *supra*, the cause of action did not survive, as the deceased did not regain consciousness, and the court erred in permitting the jury to award any damages beyond the pecuniary loss sustained by the beneficiaries.

The Minnesota Supreme Court in its opinion sustaining the trial court's instructions and theory of survivorship recognized the fact that the amount of damages awarded by the jury was far in excess of the pecuniary loss sustained by the parents of the deceased. He was an adult, and his contributions to his parents had been irregular and small in amount. But the Supreme Court held that in view of the evidence that some life remained in the injured man, but without consciousness, for several minutes after the accident, that the jury were justified in finding that his cause of action survived, and having so found, the verdict could not be defeated as excessive, because it included the jury's estimate of the value to the deceased of his loss of earning capacity, based upon his expectancy of life. This conclusion is summed up in the final paragraph of the opinion of the Minnesota Supreme Court:

"If the jury found that Ward lived an appreciable length of time after the injury, and we conclude the evidence so warrants, it cannot be said that the damages are excessive."

The Minnesota Supreme Court rendered its decision prior to the decision of this court in the *Craft* case, and

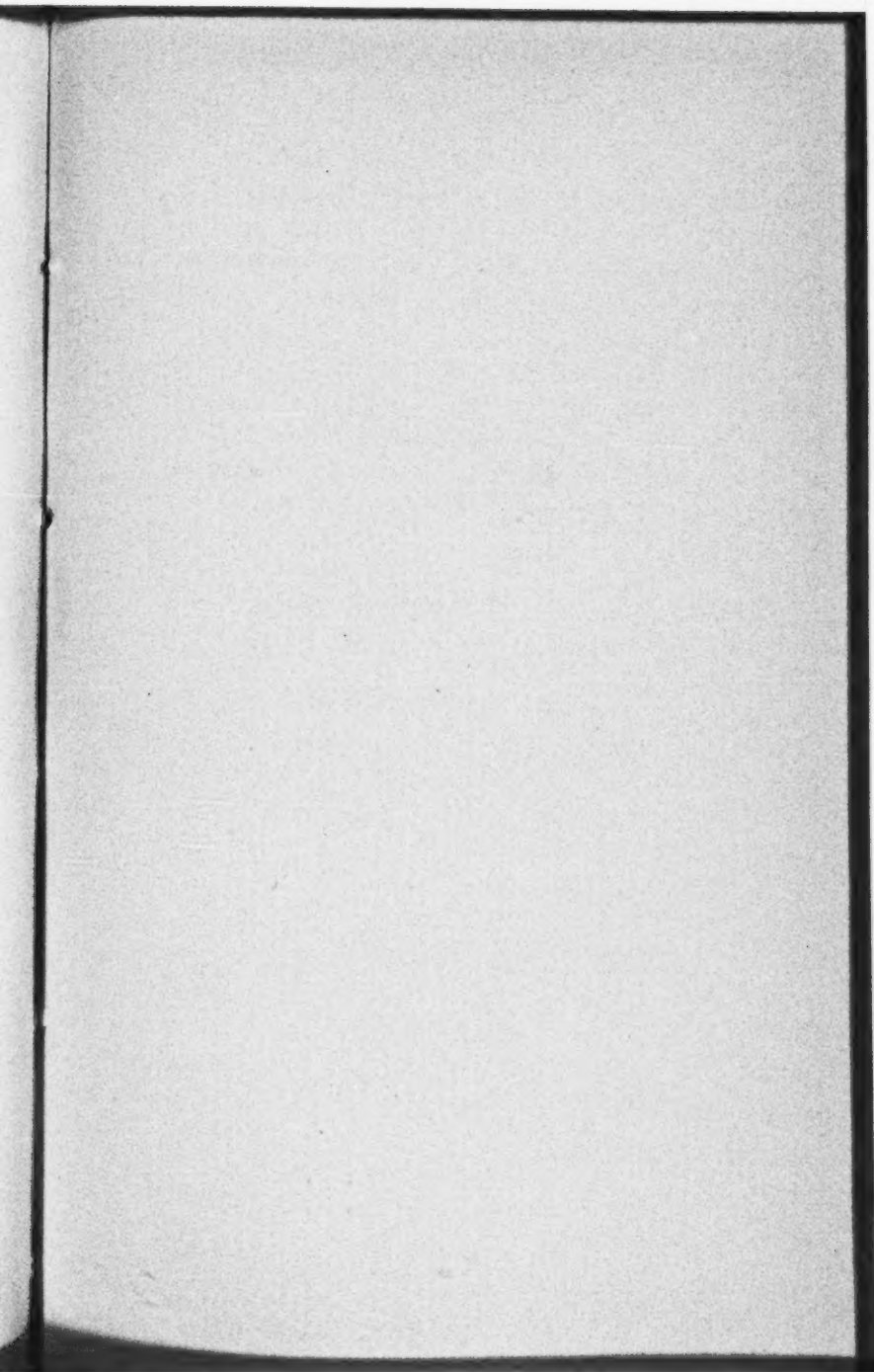
so did not have the benefit of the view expressed by this court that "the short periods of insensibility which sometimes intervene between fatal injuries and death afford no basis for a separate estimation or award of damages under statutes like that which is controlling here."

It is respectfully submitted that the judgment of the Supreme Court of Minnesota should be reversed, upon the ground that the court erred in holding that the rule of damages submitted by the trial court to the jury was the correct rule, even though the cause of action did survive.

A. L. JANES,

Attorney for Plaintiff in Error.

M. L. COUNTRYMAN,
Of Counsel.



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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 430.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.

CAPITAL TRUST COMPANY, as Administrator of the
Estate of WILLIAM M. WARD, Deceased,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The deceased, William M. Ward, was killed on the 13th day of December, 1912, in the yards of the plaintiff in error in the City of St. Paul, State of Minnesota, while engaged in switching opera-

tions. He was on top of the drag of cars being switched at the time the accident occurred, and was thrown from the top of the car upon which he was standing underneath the wheels. The evidence on behalf of the defendant in error discloses that Ward lived some ten minutes after receiving the injuries. (Printed transcript of record, pages 18, 19.) He did not regain consciousness (Printed transcript of record, page 20.)

Issue was joined and trial had in the State District Court of Ramsey county, Minnesota, resulting in a verdict in favor of the defendant in error in the sum of \$4,462.50.

This action was brought under the Employer's Liability Act of Congress as amended. After setting forth the names of the beneficiaries dependent upon deceased for support, and the extent of his contributions made during his life time towards the support of his parents, the beneficiaries, it is alleged in the complaint as follows:

"That said deceased lived, as above stated, some little time after said accident, and that during his life time he had a cause of action against the defendant and that, under and pursuant to the provisions of the federal statutes thereunto made and provided, said cause or right of action survived to this plaintiff for the benefit of said parents; that the expectancy of life of said deceased was about thirty-seven years; that had said deceased not been injured and killed, he would have lived and would have been capable of earning, during the rest of his life, an aggregate sum of at least thirty-five thousand dollars." (Printed transcript of record, page 3.)

The trial court instructed the jury as stated in brief for plaintiff in error on pages 2, 3 and 4, leaving it to the jury to decide as to whether or not the death was instantaneous, or whether deceased lived for an appreciable length of time, remaining unconscious, the court instructing the jury that, if they found that the death was instantaneous, then they should apply a certain rule for measure of damages, and, if they found that the death was not instantaneous, then another rule of damages set forth by the trial court in the charge should be used by the jury.

Whether or not the jury found that the death was instantaneous does not appear anywhere in the record, and therefore, it does not appear as to which rule for measure of damages the jury used.

At the close of the introduction of testimony on behalf of the defendant in error, the plaintiff in error moved that the action be dismissed "for the reason that the plaintiff has failed to prove the allegations of his complaint, and having failed to prove any negligence on the part of this defendant." This motion was denied. (Printed transcript of record, page 47.)

There were no requests to charge the jury submitted to the court. All the plaintiff in error did was to take general exceptions to certain portions of the charge as given by the trial court, without in any way designating in what way, if at all, the court erred. (Printed transcript of record, pages 113, 114.)

Thereafter a motion for judgment notwithstanding the verdict and for a new trial was presented

by the plaintiff in error. There again general assignments of error on the part of the trial court was presented, without specifying in what particulars the court erred. (Printed transcript of record, pages 115, 116.)

The assignments of error in the State Supreme Court are also general in character, with the addition of assignments of error to the effect that the court erred in submitting as a question of fact for the jury to determine whether or not Ward was instantly killed, and that the court erred in assuming that, if Ward was not instantly killed and remained unconscious, a right of action would survive to the personal representatives of the deceased, and that the court erred in instructing the jury that the cause of action survived to the personal representative of the deceased under the Federal Act, if deceased lived some appreciable length of time after the accident.

At no time did plaintiff in error question the correctness of the rule for the measure of damages adopted by the trial court. This appears conclusively from the following language, quoted from the opinion of the State Supreme Court:

"Ward's injuries were received subsequent to the amendment of 1910 of the Federal Employer's Liability Act, and we do not understand that defendant challenges the correctness of the instructions of the court as to the proper damages in case Ward's cause of action survived. There being no conscious suffering nor any expenses for medical attendance, the court limited the recovery, in case he was not instantly killed, to the loss of earning capacity. There

was testimony that Ward, though unconscious, lived some moments after being removed from the train. The court instructed the jury that, if it found that he lived an appreciable length of time after the injury, his cause of action survived. The defendant contends that, since Ward never regained consciousness and had no conscious period of suffering, there is no reason why the action should survive; and that, 'the theory of a survival of an action is that there was a period of time during which the deceased could have brought an action in his own behalf.' By that, we assume, it is meant, that there should have been a physical possibility to begin an action in his behalf before his death. The authorities cited do not support the contention." (Printed transcript, record page 123.)

ARGUMENT.

It is apparent from the record in this case, as shown by the portions referred to in the statement of facts, that the only federal question involved, if it be such at all, is whether or not the trial court erred in submitting to the jury for its determination the question of whether or not the death of decedent was instantaneous, the court instructing the jury, in substance, that, if they found the deceased lived an appreciable time after the injury, although remaining unconscious, one rule of damages would apply, namely, the defendant in error would be entitled to recover such damages as the deceased might have recovered had he survived, eliminating, however, any recovery for pain and suffering. As set forth in the statement of facts, it is further apparent that the rule of damages as thus given by the trial court, and adopted as correct by the Supreme Court, was not questioned by the plaintiff in error in either court, its sole contention being that, under the evidence, the death must be held to have been instantaneous as a matter of law, for the reason that the deceased remained unconscious and was physically unable to bring an action in his own behalf, and, hence, the rule of damages given did not apply.

This Court having held in *St. Louis & Iron Mountain Railway v. Craft*, 237 U. S. 648, that the damages recoverable under the 1910 amendment must be confined to the personal loss and suffering of

the injured person during the period of time between the injury and the resulting death, it is clear that the rule given in the case at bar on this phase of the case was erroneous, and that, had the plaintiff in error properly raised this question, it would be entitled to a reversal under the case cited. The plaintiff in error raised no such question. It is not involved in any assignment of error, nor was it passed upon by either court below. This situation presents for the consideration of this Court on this record only the abstract question of whether or not the death was instantaneous. This would be vital, if the rule of damages given by the court below was at issue under proper exceptions and assignments. It is our contention that on this record this question is moot. This Court is asked to assume the burden of determining whether, under the evidence in this case relating to the circumstances surrounding the death of the decedent, he survived so as to entitle the defendant in error to a recovery upon an erroneous theory of the measure of damages adopted by the trial court and acquiesced in by the defendant in error as correct and proper. Why should this Court assume that burden? The rule of measurement of damages was the vital question in the case. Had counsel raised the question and obtained a ruling on the same favorable to their contention, then there would have been no question of damages nor any question of survival submitted to the ^{Jury}~~Court~~ for the reason that it was conceded that the deceased did not suffer any pain during the short period of time he

survived. Not having raised the question properly in the trial and state Supreme Court, it would seem to be quite clear that there is no question to be presented to this Court.

THE DECEASED DID SURVIVE AND HIS CAUSE OF ACTION SURVIVED WITHIN THE MEANING OF THE DECISIONS UPON WHICH THE DECISION OF THE STATE SUPREME COURT WAS BASED.

It is not contended by plaintiff in error that there was no evidence to the effect that the deceased lived some little time after the accident occurred. Its contention was that, notwithstanding the fact that deceased lived some ten minutes after the accident, yet, because he remained unconscious, and therefore could not have instituted an action on his own behalf, he did not survive and no cause of action survived. But this contention was made in connection with the concession that the rule sought to be adopted for the measure of damages in a survival case was correct.

The decisions upon which the state Supreme Court based its opinion are given in the opinion on pages 123, 124 of the printed transcript of record.

Thus, in the case of *Hollenbeck v. Berkshire Ry. Co.*, 9 Cush. 478, Chief Justice Shaw says:

"The accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer."

Chief Justice Bigelow, in *Bancroft v. Boston & Worcester Ry. Co.*, 11 Allen, 34, says:

"The continuance of life after the accident, and not insensibility and want of consciousness, is the test by which to determine whether a cause of action survives."

In *Tully v. Fitchburg Railroad*, 134 Mass., 499, the Court says:

"If the intestate lived after he was struck, though the time be brief, the cause of action survived."

See also to the same effect:

St. Louis, etc., Ry. Co. v. Dawson, 68 Ark. 11.

Beeler v. Butte, etc. Co., 41 Mont. 465.

Kellow v. Central Ia. Ry. Co., 68 Ia. 470.

Oliver v. Street Ry. Co., 134 Mich. 367.

Ely v. Detroit United Ry. Co., 162 Mich. 287.

In the *Kellow* case, *supra*, the Court uses the following language, speaking of the deceased:

"If he survived the injury but for a single moment, the cause of action accrued to him as certainly as it would have done if he had lived for a month or a year thereafter."

Now, in the case at bar, Ward survived the accident for at least ten minutes. He certainly could not be said to be dead so long as life was not extinct. He would be just as much alive in the sense of surviving as if he had lived ten hours or ten days. His cause of action accrued the instant the accident occurred. The amount of damages he might be entitled to recover would depend entirely upon the length of time he lived and the extent of

his suffering under the rule laid down by this Court in the Craft case. But under the rule laid down in the various courts from which decisions have been cited, and which is the same rule which was adopted by the Supreme Court of the State of Minnesota in the case at bar, the amount of damages would not depend at all upon the length of time he lived after the accident, aside from the question of the extent of his suffering. Hence it is quite clear, not only under the rule laid down in the cases cited, but in fact, the deceased survived the accident and his cause of action sprang into existence at once and lived with him during the period he survived. The value of the cause of action is an entirely separate and distinct question. Under the rule adopted it was of considerable value. Under the rule in the Craft case, it would be of no value, if there was no pain, and the time of survival was brief. It would seem to be quite clear that, under the provisions of the Federal Employer's Liability Act, the deceased survived the accident and his cause of action survived with him, even though he remained unconscious and, therefore, did not suffer any pain. If counsel for plaintiff in error had made the claim that, in view of the fact that deceased lived only ten minutes, and during that time suffered no pain and that, therefore, his personal representative would not be entitled to any damages on the theory of survival of action for the reason that the measure of damages was fixed by the extent of his suffering, and the state court had held to the contrary, then it would

have a question to be presented to this Court. But in place of doing that, the contention was that the rule of measure of damages as adopted and concededly correct had no application because the deceased did not regain consciousness. Now, the plaintiff in error has ascertain that it was mistaken in conceding the correctness of the rule of damages as adopted, and it appeals to this Court to reverse the judgment of the state court so as to give to the plaintiff in error an opportunity to correct its mistake and present a contention for the adoption of the correct rule for the measurement of damages. The question never having been raised in the state court, it is too late now to present it either directly or indirectly.

It is respectfully submitted that the judgment of the state court should be affirmed.

SAMUEL A. ANDERSON,
Attorney for Defendant in Error.